S. HRG. 101-386

IMPLEMENTATION OF AMENDMENTS TO THE INDIAN SELF-DETERMINATION ACT

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON THE IMPLEMENTATION OF AMENDMENTS TO THE INDIAN SELF-DETERMINATION ACT

JUNE 9, 1989
WASHINGTON, DC

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IMPLEMENTATION OF AMENDMENTS TO THE INDIAN SELF-DETERMINATION ACT

FRIDAY, JUNE 9, 1989

U.S. Senate,
Select Committee on Indian Affairs,
Washington, DC.

The committee met, pursuant to notice, at 9:34 a.m., in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, Cochran, Reid, Gorton, and Conrad.

Our first panel on the Amendments of the Indian Self-Determination Act consists of the following: The Honorable William Ron Allen, Chairman of the Jamestown Klallam Tribe of Washington; Mr. Lionel John, the Executive Director of the United South and Eastern Tribes of Nashville, TN; Mr. S. Bobo Dean, Esquire, of Hobbs, Strauss, Dean & Wilder of Washington.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

The Chairman. Good morning. The committee meets this morning to consider H.R. 881, and its Senate companion bill S. 521, a bill to provide for the restoration of the Federal trust relationship with the Coquille Tribe of Indians in Oregon. The Coquille Tribe was one of many Oregon tribes terminated from Federal recognition in 1954 when the Congress enacted the Western Oregon Termination Act. Today, the tribe is one of only three tribes that have not been restored to Federal recognition. And because tribes whose federally recognized status was terminated by an act of the Congress cannot be restored to federally recognized status through an administrative action, such as the Federal acknowledgment process, Senator Mark Hatfield has asked this committee to consider the House and Senate legislation that would restore the tribe's Federal recognition.

In addition, the committee meets today to examine the process of implementation of the amendments that were enacted in the 100th Congress to the Indian Self-Determination and Education Assistance Act. The panels of witnessess scheduled to present testimony to the committee this morning will address: First, the status of the regulations that would implement the new amendments; second, the status of the self-governance demonstration project; third, the status of the act's requirement that the Federal Government provide liability insurance with a preference extended to Indian insurers; fourth, the Indian priority system, which is a system through which tribes express their priorities for funding; and fifth, the proposed transfer of the responsibility for negotiating the indirect costs associated with the operation of self-determination contracts from the Office of the Interior Department's inspector general to the Office of the Secretary. Last, but certainly not least, we will hear from those charged with the primary responsibility of implementing the amendments to the Act, Dr. Everett J. Rhoades, Director of the Indian Health Service, and the Acting Assistant Secretary for Indian Affairs within the Department of the Interior, Mr. Pat Ragsdale. We look forward to the important testimony of each of today's witnesses.

But before we proceed with the hearing, I would like to ask the Committee to turn first to the matter of the bill that is scheduled for our consideration today, the Coquille Restoration Act, and for the presentation of the bill to the committee, I would call upon Senior Counsel to the Committee, Mr. Peter Taylor.

Chairman Allen.

STATEMENT OF HON. WILLIAM RON ALLEN, CHAIRMAN, JAMESTOWN KLALLAM TRIBE, SEQUIM, WA

Mr. ALLEN. Thank you, Mr. Chairman, for the opportunity to come before you and this committee to testify regarding the critical issue of developing the Public Law 93-638 regulations.

You have my testimony before you, and what I'll try to do is articulate it as best I can without reading it too much.

This process of developing the regulations for Public Law 93-638 and 100-472 we have felt is a critical process, that is intended to try to modify the relationship between the tribes and the Federal Government consistent with the government-to-government policy.

We feel that since the enactment of Public Law 93-638 act in 1975, the tribes have made a considerable amount of progress in developing their skills and their proficiency in handling their governmental responsibilities, affairs and their programs; yet, we have always been frustrated over the bureaucratic process and regulations that have come out of that first law and the very complex bureaucratic maze that we have to navigate through in order to accomplish our objectives.

So it takes a great deal of creativity on our part to try to make the goals of that act and the goals of the tribes in their pursuit of self-determination and self-proficiency a success.

The current system, in our judgment, has never been consistent with the policy of government-to-government relationship. It has never really been administered consistent with our unique relationship as governmental entities with our treaty rights and our sovereign jurisdictional obligations to our people.

On top of that, the consistent frustration that the tribes have experienced with the paternalistic disposition that we experience through IHS and BIA has caused us to work with this committee and Congress to try to change that system and change that relationship and do it in a positive manner.

We feel that a great deal of the tribes' efforts have been aborted with the fight of the tribes trying to pursue our self-sufficiency and self-determination and independence relative to the subtle underlying struggle of a bureaucracy to survive and to justify itself. We find the battle for the precious dollars that are appropriated by Congress to us is a very difficult process for us, and we also find a great deal of frustration in terms of trying to get those dollars prioritized consistent with our priorities and purposes.

In our judgment, this reality is a part of the dilemma we are facing, and that is dealing with how we are going to implement the new Amendment Act that changes the law, and hopefully changes it in a proper context to establish the proper relationship between the tribes and the Federal Government.

We feel that this amendment has provided us the opportunity to change this system. How this regulatory process takes place to implement this law is the basic theme of my discussion.

When we worked with this committee and the House Interior and Insular Affairs Committee, we had a number of objectives that we were trying to accomplish that we recognized were deficient within the current regulatory system to address the needs of the tribes.

One of the areas that we were quite frustrated with relative to our government-to-government relationship is the consultation process utilized by the Federal agencies. We recognize that it was a process that wasn't successfully and effectively working and, in our judgment, wasn't dealing with us in that true context of government-to-government relationship. So we were very diligent about putting the word "participation" into that law to try to replace "consultation," because we felt that that is a way that the governmental relationship should be conducted. Thus, when policy and regulations are developed, such as we are dealing with right now, they would be developed in that context that we would work with the Federal Government in negotiating those solutions, remedies, and conditions under which we would carry out this activity.

We had hoped that if the bureaucracy—that is, IHS and BIA—was working with us, we would be able to walk over this threshold and spend less time fighting with the agencies and more time dealing with the needs of tribes, as well as spend a lot less time here in Washington, DC.

In the first phase of this process, the bureaus did try to implement the regulation consistent with the timeframe set out in the law, but, unfortunately, the communication and the interaction with the tribes was very poor. We appealed to this committee and the House committee to support the tribes recommendation that the schedule be delayed to allow us to actively participate in this process. We felt that that relationship was critical to make the law a success. Those of us who are responsible for implementing this law and carrying out our governmental responsibilities must utilize these amendments as the framework to administer Public Law 93-638 contracts, and assure that the activities within the contracts are realistic and reasonable relative to what we have been experiencing.

We felt, in the early phase, that the bureaucracy was not acknowledging that relationship and was not willing to do that. They wanted to proceed with the process and an approach that was essentially the same as consultation. We objected to that, and so we pushed hard for these workshops referred to as "regulation drafting workshops."

In the mind of the tribes, that process meant that we would negotiate with IHS and BIA one single set of regulations for both Bureaus—because we felt this law applied to both Bureaus—and that the context in which each of those sections applied to Public Law 93-638 contracts would be a context consistent with the practical application and implementation for those of us who actually administer it.

The first two meetings took place in Nashville and Albuquerque. They were well attended by approximately 250 tribal representatives. Consistently, the same faces showed up at these sessions, and they were the tribal leaders, their technical assistants, lawyers—people who represented the tribes and understood what these regulations meant.

We put this into a form in which we would try to negotiate it. We recognized in the early phases of this process that the Bureau was struggling with it, and they were struggling with it in the context that they felt that this was not a negotiating process; this was a process where they were going to hear the views of the tribes, and then they would go back to their offices and draft the regulations as they saw fit, taking into consideration those views. Now, that is not different from the consultation process.

In our mind, the identity of the document that we drafted—and we drafted that document in the context of regulations, so that what we were dealing with was the actual substance that we felt would come out in a published form. This was critical, and we worked very hard at accomplishing that.

We consistently heard Federal positions that said that we didn't understand what regulations were all about. Of course, we objected to that view, because we feel that we have the expertise, knowledge, and the competence to understand exactly how to develop regulations. You don't have to live and work in Washington, DC, to know how to develop regulations. And we wanted to put them in that context.

We weren't concerned about minor technical aspects, but we were concerned about substance. We had a great deal of difficulty getting the Bureau, particularly, to come prepared to negotiate those positions. That was quite frustrating for us. It was frustrating because they would make arguments that they weren't prepared and they didn't come to these sessions understanding what they were about. We felt that they should have known, and there was no reason for them not to know. The communication, in our judgment, was very clear about what this purpose was.

The Bureau and IHS, to a certain extent, made arguments that this environment of 250 tribal representatives was not the proper environment in which you can develop regulations. We recognize that that is a difficult forum, but we also pointed out that this forum is necessary so that the very complex objectives for all the tribes, villages and rancherias involved are addressed so that the unique conditions of each of our tribal areas and needs could be addressed as well as possible. We felt we could work out our differences and recognize that the dynamics of the process will allow further modifications down the road. The process was basically rejected by the Bureau.

We had also recommended that we could utilize the steering committee that was established by the Indian Health Service to be the liaison between the tribes and the bureaucracy, and that the Steering Committee, which was initiated by the IHS program but was selected by the tribal leadership in the 12 regions, we felt—the form of which, as we moved forward in this process from the larger group to a smaller group, that those smaller representative groups could work out the details as the larger group moved a little bit closer in what we though was the appropriate context of these regulations.

Now, that hasn't been accepted by the Bureau. It has been accepted by IHS, and they initiated it, which means that they acknowledge, in our judgment, the governmental relationship between the tribes and the bureaucracy.

We are quite frustrated that the Bureau seems to think that Indian representatives on IHS are only knowledgeable about Indian Health Service issues. We pointed out that the Indian leaders on the Steering Committee are Indian leaders who deal with both BIA and IHS issues and are knowledgeable with the broad expertise and background to deal with both bureaus, including the broad spectrum of programs that are addressed inside the BIA.

That has been a frustrating experience for us because the Bureau has not been willing to acknowledge that entity to try to work out the details, or even come to an acceptance of the concept that we would negotiate these regulations.

The other example of frustration that we have experienced was putting the schedule together to develop the regulations. We couldn't even get cooperation to get a consistent schedule. We kept getting arguments that the Bureau was a different system, and so therefore we had to work out a different kind of a schedule. Only slowly, in the recent weeks, have we developed a schedule—with a great deal of frustration and effort—that is somewhat consistent.

A part of it is that we have consistently asked for the cooperative spirit between the tribes and the bureaucracy to make this thing happen, and to try to make it happen expeditiously.

We hear comments that the departmental clearance process statutorily is mandated to have 60 days minimum, and OMB has another 30 days. Our problem with that is that the statue exists, but that doesn't mean that you can't, in good spirit, work with us to try to expedite that. Can we work to try to make that happen quicker, if we could work together? There was absolutely no offer to try to make that happen.

The other thing that bothered us a great deal was that we had heard from the Bureau that this would never get by OMB. That really irritated us, too, because it was like this Darth Vader sitting in the background that you'll never get by, and we felt that it was absolutely inappropriate that an entity within the administration should be used as if that's going to be our hammer, if you will, to modify regulations or the contents of regulations.

We ask why we couldn't meet with OMB, the Bureau, and IHS together and work out some of these differences so that we, the tribes, are communicating the needs for the regulations together and work out the problems so that there is not an intermediary between us, the Bureau and OMB regarding how these regulations should be developed. We point out that BIA didn't wholeheartedly support this law, nor did IHS. IHS even recommended to the President that it should be vetoed.

With those understandings, we had a great deal of skepticism whether our views would be clearly articulated to OMB individuals regarding how these regulations would be developed.

So this attitude has been a real problem for us, and a difficult experience for us in the willingness of the Departments to work with us.

We feel like the way the process is emerging, what has happened in the recent past at the last workshop in Albuquerque, that the Bureau and IHS—the Bureau, particularly—has taken a position that they're going to draft the NPRM, that is, the Notice of Proposed Rule Making for the regulations, and that we will be allowed to comment to try to modify them through the comment process, which is simply no different than the current consultation process.

Now, IHS has been willing to work with us. We point out to the committee that there is a distinct difference between the way IHS is dealing with us versus the way BIA is dealing with us. IHS, in my judgment, is acting more as a trustee to us than the BIA because they're willing to work with us in the sense of to review their draft, to review their NPRM before it goes out, to negotiate the context and the conditions of those regulations, and to work out a compromise.

The BIA, on the other hand, has said they will not give us any document, or even show us any draft, until after the document is completely completed. So the frustrating experience is that we have an inconsistency in the way the two departments are acting.

So, as you can see, where we are in this process is that the regulations are in the hands of the two Departments. There is a difference between the way the tribes are interacting with IHS, as opposed to BIA, in this process.

We recognize there are still some problems in IHS. I have given some more positive comments towards IHS, but there are still some problems in IHS within the HHS level of the Department responsible for promulgating regulations. We recognize those same kids of problems also reside in the Department of the Interior.

But we feel that if they would work with us in actually sitting across the table in working these problems out, that these issues could be concluded much more in the context of tribes.

In conclusion, I would like to urge this committee to assist us in influencing the administration to implement this law. Right now the primary issue is the Department of the Interior and HHS's cooperation regarding this bill. We feel that if we are not able to implement this law consistent with the President's policy of government-to-government relationship and consistent with the Congressional mandate of pursuit of self-sufficiency and self-determination, then, in our judgment, this effort would result in a grave disappointment. We would digress back to a status quo condition which would be very discouraging for the tribes. It simply means that we would be back-peddling a number of steps and would have to make another charge.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Allen appears in appendix.]

The **Chairman**. Thank you very much, Mr. Chairman.

Mr. John.

STATEMENT OF LIONEL JOHN, EXECUTIVE DIRECTOR, UNITED SOUTH AND EASTERN TRIBES, NASHVILLE, TN

Mr. **John**. Good morning, Mr. Chairman and members of the committee and staff.

I am pleased to be here this morning testifying before you on some recent events that surrounded the Public Law 93-638 amendments, Public Law 100-472.

I must share with you first that I have just had a wonderful experience, having been selected by tribal people to participate and help chair the proceedings of the regulation work groups. I also had the wonderful experience of being a cochairperson of the Indian Health Service steering committee. It has been wonderful to work with these people.

We would hope the spirit of this experience would be something that we could build on and that we could continue to work in this direction, when Indian measures are enacted, that the tribes be given participation.

I don't know of any other legislation where we had specific language that called for participation of Indian people into a regulatory development process. It has worked to a point. However, we feel that there are still some things missing in the process.

One of the things that I would recommend to the committee is to consider either another amendment or to have a technical amendment to refine some of the areas that have surfaced at this stage of the development process that may need clarifying language.

I'm going to touch on some of these items in my discussion this morning and see if we can encourage some further development of clarifying language.

First off, the process which we have spoken about this morning of involving tribes has fallen short in terms of what is desired.

We had this experience where we were able to work with the agencies. Of course, we struggled through the learning process of how to get along with each other, but it did take some steps forward.

Now it seems that at this stage of the process, as Mr. Allen pointed out to you, there are other parts of the process that are looming as impediments to a total combination of effort. It seems that the language has to touch on the refinement of the process in dealing with OMB and with the departments. We work at the lower agency levels quite well at this point, but it seems that we don't have access to encourage any expedience on the part of the Department and OMB.

This was demonstrated in the schedules that we are working under today. We are now looking at some implementation date of late 1990, which is really uncertain because, as we go along month by month, there seems to be new occurrences of issues that surface that slow down the process. As a result, we don't really know when we'll arrive with the regulation. I don't think that was the intent in the first place, because it was very explicit in the amendment that there were time lines established when things were to occur.

Once we got into the process we recognized that truly those time lines were far too short for the entire process to be consummated, but we think now that the time lines are far too long. And there is nothing to control that. That's the point I'm bringing to you. There needs to be additional language to expedite the process.

This whole business that we are involved in is a process of change, and we have gotten this far with the experience that we have so far, and we need to look beyond that to see what we can add to it to make these things happen much more readily, because the end result of what we are looking at is improved conditions for Indian people and Indian life on the reservations. Any time we have delays in implementation of regulations, or any enactment of a law, it just means that there is that much longer a wait for Indian people to realize benefits from these new laws. We wish that that would be examined.

In the development of the regulations, there are a number of issues that have surfaced which we think need additional attention.

One of these issues, as I recall, in earlier hearings in previous years there was a great deal of concern on tribal recovery of indirect cost. At this time, we have worked with the indirect cost issues, and I don't feel satisfied that we have yet found the solution of what we're trying to achieve.

In the first instance, the tribes were very anxious and hopeful that we would find a mechanism whereby the tribes could, once and for all, recover the full cost that they were experiencing for operating Federal Government programs.

While we have language very explicitly saying in the amendment bill that there will be 100 percent indirect cost recoveries paid to the tribes, we find that at least so far in this year's experience that neither agency has demonstrated any willingness to follow the language of the amendments.

From the Indian Health Service, there are shortfalls recognized. There is provision in the act that each secretary must come back to the appropriation committee by March 15 and ask for supplemental monies. Instead of that, we had a request from Indian Health Service to take what it called third-party recovery—clinical and hospital sites collecting from insurance companies and using that money to supplant the government's responsibility for indirect cost payments.

The tribes—and particularly in the USET area—feel very strongly opposed to that. They feel that those monies that are gained by third party recovery should be used to broaden the delivery of health care and that the money should not be used in substitute of providing the 100 percent recovery to the tribes.

The Bureau of Indian Affairs is the movement on with the indirect cost issue of transferring the negotiation of indirect cost rates, as has been described already. The USET tribes met earlier this week and tribal chairman from Mississippi, Mr. Philip Martin, introduced a resolution which was unanimously adopted by the USET member tribes opposing the transfer of the indirect cost negotiation simply because they feel it is the old adage of "the fox in the hen house" routine.

Most disturbing to the tribal leaders was the language in the justification for the Bureau's budget, which indicated that the Bureau was intending to reduce overall costs of indirect recoveries. The tribes feel that that's just another game to shorten what those tribes are going to recover, and they just don't feel that's appropriate.

We have, on various occasions, offered solutions or ideas to agencies which generally go unheard. We do think that we have some ideas on how this could be worked out, and we think that there needs to be additional emphasis put on this matter because it isn't satisfying, as yet, as it is developing.

Additionally, in relation to funding problems, the Bureau, of course, was instructed in the act to engage in a study of its budget, its funding process, and the IPS—the Indian Priority System.

The Bureau, we feel—at least from the Eastern Tribes—shortchanged the effort by not providing any funds to conduct the work. There was a total restriction on using any Bureau money for any type of study work; thus, it made it very difficult for tribes to deal with the subject.

Furthermore, we discovered in the process that, generally speaking, tribes don't understand the Bureau's budget process, and when we asked the Bureau if they would teach the tribes what their processes were, we didn't get very far with the request.

So there is more work that needs to be done with this, and I really worry that the report that you have received back from the Bureau of Indian Affairs may be lacking in quality because it did not get the full play that at least the Eastern tribes felt that it should have had. I bring that to your attention this morning.

The need for joint regulations and joint process between the two agencies has already been mentioned. That's one of the shortcomings of the amendment bill. While it was addressed in the report language, there was no specific language in the amendment that required the two agencies to come up with common regulations. We think that in order to make this happen, then the language must be inserted; otherwise, it will continue to wander around. We think that we need to see some language to kind of shepherd that along.

So far in the work, as far as the development of working documents, we find that the amendments addressed specific contracts. There had been work that had been going on previously with the agencies about simplified contracts, and this process doesn't really seem to address that in the fullest sense.

Also, in the act, itself, there seems to be an oversight as far as the emphasis placed on grants and cooperative agreements. It has been mentioned briefly, and has been addressed only briefly so far in the development process. So we think that there needs to be more attention paid to that.

The law speaks to the provision of general liability insurance for tribes. I know in the audience today and later to testify before you will be other experts, but I just wish to mention to you that the tribes are very interested in some form of development where they can participate in an economic development manner to form an

Indian insurance company and, in the process, help tribes help themselves.

I will defer on that subject to other witnesses this morning and let them broaden the issue.

We did find that there are some inconsistencies. When I mentioned technical amendments earlier, the inconsistencies that I speak of are key points between the recent passage of the 437 amendments and the 638 amendments. We have some of those delineated in a document which we will present to you.

There was concern from the tribal sector that the work thus far focus a good deal on the necessity for standards. There was some discussion about the possibility of using standards or the requirement of standards as a sort of barrier or obstacle and using it as a form of declination. While the amendments are silent on the issue of declinations, as had been in the previous act, we now have this issue of standards.

The tribal people certainly feel and understand that there is definitely a need for standards. I think the issue is who is going to master the standards and how they are to be utilized. The tribal people subscribe to standards. But the point that I raised that the tribes are objecting to is that these issues be used as obstacles—as declination issues. We don't think that is the intent of this amendment.

We have a concern about some language we didn't deal with thus far to any appreciable degree in the regulation development process about a citation in section 102 of title II which states that the contracting capability will extend for funding to other agencies than the Bureau of Indian Affairs and the Indian Health Service, and that gives us a little bit of difficulty—particularly the word "other." We're not sure if that allows that we can use these Public Law 93-638 mechanisms to contract with the Department of Labor, with Housing and Urban Development, with the Department of Education, and with other governmental agencies.

We think that needs some clarification as to what we really intended to have happen. Certainly, I believe Indian people would be delighted to have a single process to deal with the Government. One of the major complaints before us, as you may well know, is that there has been long records of multitudes and multitudes of reports and contracting requirements put upon the tribes from all of the various governmental agencies. We are just simply looking for an easier way to go, and we think that this might be the vehicle. I'm suggesting that be looked at and broadened.

Additionally, we did have some concerns about a couple of other items. The Indian Health Service came in with a split budget this year distinguishing between the Federal and the tribal funds. The tribes don't clearly understand the intent of that and are suspicious of it, and, at the present time, wish that the subject be deferred until we can understand what is intended and what can be accomplished by going by that process.

We think that those types of adventures ought to be researched and discussed with tribal representatives before we get to actually submitting to such things.

One other issue which is not contained in the amendments but is of grave concern to Indian people is the subject of eligibility for services under the Indian Health Service. We have provisions that are standing out there today which have postponed the implementation of final regulation on eligibility. We understand that the work is underway by the Indian Health Service to deal with the issue, but that the reports may come in late.

We really think that there has to be some very in-depth work done on that issue and, even beyond that, the tribes feel very strongly, as we have stated to you before, that the issue of eligibility is certainly the domain of the tribal governments. We don't feel that governmental agencies should be dictating to tribes who is going to be serviced or members of their tribes. That has been a long-standing position of Indian tribes.

I have a final item here which I will just mention briefly. There are a number of issues that we have dealt with both in the Bureau of Indian Affairs and the Indian Health Service in this regulatory development process which have fallen victim in reality to a shortage of time.

We had the regulation development workshops going. Indian Health Service primarily sponsored these workshops and then ran against a shortage of funds to continue work. We left the last workshop, which was held in Albuquerque, with a number of issues which I call out to lunch. We did not reach conclusion in all respects of consideration for these issues, and while the agencies are continuing to develop regulations for those subjects, they're going to be coming back out to Indian country without the benefit of full participation. We'll have to address it in that fashion because we simply ran out of time.

The agencies didn't have any more funds to continue this process that we were using, and so subsequently we have had to drop back and resort to other measures to get the work accomplished.

I will conclude my remarks this morning. I certainly appreciate the opportunity to come before you and express the concerns that I have realized exist out in Indian country. I will certainly be happy to continue to work with you.

Thank you, Mr. Chairman.

[Prepared statement of Mr. John appears in appendix.]

Senator COCHRAN. Mr. Chairman.

The CHAIRMAN. Yes?

Senator COCHRAN. Mr. Chairman, I wonder if I could ask that a copy of the resolution that Mr. John referred to that had been adopted at the recent meeting that was offered by Philip Martin, Chief of the Mississippi Band of Choctaw Indians be printed in the record as an exhibit to his testimony.

The CHAIRMAN. Is the resolution available?

Mr. JOHN. I would need to get it. It was transported back to my office, and they are putting the appropriate numbering scheme to it. We will submit it to you, sirs, as readily as possible.

Senator INOUYE. Upon submission, that resolution will be made part of the record.

Senator COCHRAN. Thank you, Mr. Chairman.

[Resolution appears in appendix.]

The CHAIRMAN. Thank you very much.

Mr. Dean.

STATEMENT OF S. BOBO DEAN, ESQ., HOBBS, STRAUSS, DEAN & WILDER, WASHINGTON, DC

Mr. DEAN. Good morning, Mr. Chairman.

My name is Bobo Dean. I am with the law firm of Hobbs, Strauss, Dean & Wilder of Washington, DC, and Portland, OR.

We are presently representing 13 tribes and tribal organizations in connection with tribal participation in the development of the regulations under the 1988 amendments to the Indian Self-Determination Act. I have personally been involved in Federal-Indian law since 1965, and represented the Miccosukee Tribe in 1970 when it negotiated the first contract for tribal operation of an entire BIA agency.

We have provided a written statement to the staff of the committee, and also a memorandum analyzing the April 3 draft regulations which were circulated by the Indian Health Service to tribal representatives across the country. And also, although I believe it is not an official issuance of the BIA, it does note a number of BIA comments and input with respect to the regulation process. So far as we know, that April 3 draft is the last draft of the regulations that is publicly available.

We would ask that the points that we have made in those statements be considered.

In our oral testimony, we would simply like to highlight a few of the points where, to borrow a phrase from Mr. John, we feel that the Federal agencies are perhaps out to lunch in their approach to the particular issues that are before them.

I would also like to ask that we have an opportunity to submit for the record a statement on the construction regulation portion of the regulations. The tribal representatives and the IHS construction work group are still at work developing an approach to the application of the Federal acquisition regulations to 638 construction regulations.

The amendments provide that the exemption from Federal acquisition regulations does not apply to construction, although it does apply to other forms of Public Law 53-638 contracting. The issue there is whether that means that all of the Federal acquisition regulations are applicable or whether the secretaries retain the right, as the statute would seem to provide, to waive those Federal acquisition regulations that are not appropriate in an Indian self-determination contract.

That issue has been discussed but not resolved in that work group, and my understanding is that the Federal representatives indicated a willingness to consider tribal input on that issue. That is still in preparation. I believe we will be able to provide something in a few days to the committee that we ask to be included in the record.

The CHAIRMAN. So ordered.

[Information to be supplied appears in appendix.]

Mr. DEAN. Thank you.

One of the major disputes which has arisen in the history of the Indian Self-Determination Act over the years involves the level of funding to which tribes are entitled under the act. Under the April 3 draft, the appeal of a funding dispute is treated as a declination under the act. This ensures that funding does not become a threshold issue to be resolved before a proposal can be processed—a position which had been taken by the Indian Health Service in the past and which is criticized in Senate Report 100-274, the legislative history of the 1988 amendments.

We believe that the April 3 draft correctly addresses this issue, but we understand that the Indian Health Service objects to the draft language because it refers to a funding level appeal as a declination appeal. IHS, we understand, is willing to provide the same hearing and appeal rights when a contract is refused on a funding issue as it does in any other dispute, but unwilling to describe such a refusal to contract as a declination.

In our opinion, this is not merely a semantic dispute. The act requires the Indian Health Service or the BIA to do one of two things when it receives a request from a tribe to contract: One, it may approve the proposal; or, two, if its objects are not resolved through discussions and negotiations, it may decline it and provide an appeal and a hearing. That is the statutory mandate. The April 3 draft reflects this mandate.

The IHS approach that a dispute over funding involves a third alternative is unacceptable, even when the same appeal rights are provided by regulation. Under the IHS approach, as we understand it, such rights are provided by the agency as a matter of grace. In fact, the statute gives IHS no third alternative. It must approve or it must decline in accordance with the statutory declination procedure.

We urge, therefore, that the language of the April 3 draft should be retained.

The IHS also seeks to add a sixth method to the five statutory provisions which allow the unilateral reduction in a recurring contract funding level. The IHS would add "changed circumstances and factors" as a ground on which the agency may unilaterally reduce a contract funding level in future years.

We are unaware of the statutory basis for this IHS regulatory proposal which would substantially increase the discretion of the agencies to reduce recurring contract funding levels without tribal consent.

Section 105(c)(2) of the act permits "changed circumstances and factors" to be taken into consideration when contracts are renegotiated, but that does not authorize unilateral reductions by the agency, and we believe that the regulation should track the unilateral reduction provisions which are contained in the 1988 amendments.

We are also concerned with the status of the implementation of calendar year contracting mandated by section 105(d) of the amended act. As we understand this provision, it requires that contracts in fiscal year 1990 commence on January 1, 1990, "unless the Secretary and the Indian tribe or tribal organization agree on a different period." However, the Administration has not requested the quarter-year funding necessary to implement this provision without leaving the final quarter of the contract year contingent on a future appropriation.

The whole reason that I understand that Congress provided for calendar year contracting was to enable the contract to be negotiated and put in place based upon firm appropriation figures; therefore, to implement this provision without having in hand the funds necessary to fund the contract for a full year would defeat the purpose of the amendment.

We urge that your committee work with the Appropriations Committee to assure either that the Bureau of Indian Affairs and Indian Health Service be provided with the dollars necessary to implement this provision in fiscal year 1990, or that the act be amended to prohibit BIA or IHS from insisting upon calendar year contracting over the objection of the tribal contractor.

We also believe that the Indian Health Service has taken an unnecessarily restrictive interpretation of the new statutory language relating to mature contracts. We recognize that the mature contract is a new and, so far as we know, unprecedented concept in government contracting. IHS has concluded that an Indian tribe wishing mature contract status cannot opt for a mature contract for a specific term of years—that the term of the contract, under the 1988 amendments, must be indefinite.

We urge that the committee review this matter with IHS to clarify that a tribal governing body has the discretion to select a contract term which it deems best for the needs of its members and most consistent with the purposes of the contract, and that the 1988 amendments are not meant to require an indefinite term for a contract qualifying as mature when a definite term—for example, 5 years—is more appropriate based on the needs of the tribe or the purposes of the contracted program.

The Bureau of Indian Affairs suggests that the declination criteria of section 102 of the act shall apply to the renewal of an existing contract for the same functions or programs. That is to say, if a tribe has contracted a law enforcement program and the contract comes up for renewal and they are not expanding the functions which they contracted—simply a renewal of a program which has been in place and which has already passed the declination criteria—the Bureau position, as I understand it, is that the contract proposal would have to be again reviewed against the declination criteria in the same manner as it was reviewed initially.

This is contrary to the present BIA and IHS regulations. The existing BIA regulations provide that contracts will be renewed when involving the same functions as already contracted.

We advocate the retention of that language, and adding to it a phrase from existing BIA guidelines, "renewal of such contracts is not at the discretion of the Secretary." We urge that that language should be incorporated into the regulations.

The IHS also seeks to eliminate regulatory presumptions from the draft which make it easier for an Indian tribe or tribal organization to contract under the act. The regulatory presumptions which are continued in the April 3 draft from the existing BIA and IHS regulations clarifies that the burden lies with the Secretary to prove that an Indian tribe cannot satisfactorily operate a Public Law 93-638 contract.

We believe that these provisions, which are essentially a part of the present system and are included in the April 3 draft but questioned by the Indian Health Service, should be retained.

The IHS also wishes to weaken the statutory timeframe in which to award a contract under the act. The IHS would provide in regulations that a contract which was not declined on the 60th day is deemed approved on the 90th day "to the extent the proposal conforms to the law and regulations," and would delete language which would allow the Indian tribe to incur contract costs from the 31st day after approval of the contract.

As we understand the 1988 amendments, it mandates that the agencies act to disapprove and provides that the contract shall be approved on the 90th day if it has not previously been disapproved.

The language proposed by the IHS would have the effect that a tribe would essentially proceed at its peril where the agency has not acted, and it could act as though the contract had been approved, but the Agency would still be able to complain later that the proposal was not in conformity with the law or regulations.

We think that if a proposal is going to be declined by the agency, the Agency should gear itself up and act to provide a declination notice within the statutory timeframe.

Another controversial issue in the regulation drafting process has been the question of program quality assurance, program standards, and data recording requirements, which Mr. John has mentioned.

The reason for this controversy is that this section goes to the heart of the contracting debate; namely, how much authority are the Federal agencies willing to relinquish to Indian tribes and tribal organizations which contract under the act. It is a question of who will ultimately exercise control over the lives of Indian people.

The Act, especially as amended by Public Law 100-472, answers this question in favor of the Indian people, themselves.

In the area of program quality, the IHS and tribal representatives have reached a compromise which is reflected in the April 3 draft on the issue of tribally developed standards and data requirements. The IHS still has some reservations, but has recognized the right of Indian tribes to develop their own standards, which must be reviewed and approved by the agency.

The Bureau is still reviewing this position and has yet to comment so far as we are aware. Its representatives have suggested that for some Bureau-funded programs there must be specific mandatory program requirements. This may be so in some instances. For example, regulations perhaps should provide that certain training must be provided to police officers carrying firearms. There may be a series of mandatory requirements, to which I would suspect no tribal organization would object.

But these minimum requirements should be stated in regulations to assure fairness to all tribes and to deter the agencies from imposing detailed requirements as to program content which would inhibit innovation in the tailoring of programs to meet tribal needs.

As I have noted, we have included a number of other issues in our written statement. To conclude my oral testimony, I would only like to mention that I think the regulation process so far has not sufficiently addressed the manner in which other programs in the Department of the Interior and the Department of Health and

Human Services will be brought into the Public law 93-638 process. Both agencies have recognized that the 1988 amendments make other programs carried on by the Secretaries for Indian tribes subject to 638. They have indicated that they are developing, in consultation with those other agencies, some approach to those programs, but we are not aware of where that process has reached.

I would simply then like to thank you, Mr. Chairman, for the opportunity to present these views. And I would urge that the committee continue this oversight process and work closely with both agencies until the regulations are issued.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Dean appears in appendix.]

The CHAIRMAN. Thank you very much, Mr. Dean.

Before we proceed, may I assure all the witnesses that your prepared statements and supporting documents will all be made a part of the record in total, together with your oral statement.

The matter before us today and the discussion that evolves around it are very important. In my mind, this may be the most important hearing of this session because we are considering something very fundamental and basic, and that is the nature of Indians, Indian tribes, nations, and rancherias, the nature of the Government of the United States, and the nature of the relationship between Indian organizations and the Government of the United States.

Under international definitions, the United States is considered a sovereign. A sovereign is one who is generally empowered with determining membership or citizenship, has the power to enact ordinances or rules and regulations that will affect the conduct of its members. A sovereign usually has the power to tax.

The United States is a sovereign. Do you consider Indian nations and tribes to be sovereign?

Mr. ALLEN. I might try to respond to that, Mr. Chairman. In my opinion, the answer is yes. We firmly believe that the tribal governments are sovereigns. We believe that we have the right and responsibility to manage the affairs of our tribes and our resources. We are frustrated over some of the losses that we experience—whether it might be through legislation or through the court system—but we are adjusting to it as a reality checked to the conditions that we are experiencing today.

But the tribes do not have any reservation and do not fall back one inch in their efforts to move our governments forward in terms of managing our affairs—to be able to control our governmental affairs to the fullest context.

That is what we feel we are trying to accomplish through the various laws that we urge Congress to pass to allow us to implement that relationship between us and the Federal Government.

We recognize that the cross-jurisdictional issues can be very complex, but we feel that, as we move forward within the competence, expertise, and capabilities of the tribes—all the way from the skills that we have as managers to the legal aspects to the political skills of the tribal leadership—we do act in a manner of the same kind of sovereign context as the U.S. Government.

We recognize that we are a microcosm. We are very small as against the backdrop of the U.S. Government. And we feel that we can move forward and work collectively together, but we need the kind of spirit and attitude and cooperation that is necessary for us to accomplish that.

The funding and assistance that we get through the Federal Government's obligation to the tribes through statutory or Executive Orders or statutory laws or treaties is critical to making that happen, and we feel that's what the Self-Determination Act was trying to accomplish—to give us strength and be on our feet.

The CHAIRMAN. I just want to know: are you sovereign?

Mr. ALLEN. Yes.

The CHAIRMAN. Mr. John, do you consider Indians to be sovereign?

Mr. JOHN. Yes; I do. I look at it a little further back, in a sense, in that the Indian tribes have always been sovereign tribal governments in this country. Even though Indian tribes were defeated and conquered by the U.S. Army back in the formation of this Government, Indian governments and Indian tribes have never been dispossessed of their right of government.

What we talked about today in a lot of these discussions surrounding Public Law 93-638 amendments and so forth is really the provision of services. Because Indian people are poor, they need help, they need redevelopment—just like a foreign country might. The U.S. Government has been generous and has sought to help the Indian tribes, and that's a separate issue than the tribes' own ability to self-govern and continue to govern. They have never been dispossessed of that, and they still hold it intact as they always did.

The CHAIRMAN. Mr. Dean, as a lawyer do you consider Indians to be sovereign?

Mr. DEAN. Yes; I do.

The CHAIRMAN. I consider Indians to be sovereign. The Constitution so says as do laws that support that proposition. And the treaties that we have entered into with Indian nations are the usual requirements of a sovereign relationship.

Now, on the nature of our relationship—-and this may sound facetious, and I am not being facetious—is that relationship one of a master and subject, with the master being the United States and the Indians being subjects? Or patron and peasants? Or ruler and subject? Is that the relationship that should exist?

Mr. ALLEN. Mr. Chairman, I feel the answer is no.

The CHAIRMAN. Thank you. Is it a sovereign to sovereign relationship?

Mr. ALLEN. I didn't hear the question. Did you say "sovereign versus sovereign"?

The CHAIRMAN. Yes.

Mr. ALLEN. Yes.

The CHAIRMAN. We have heard many speakers describe this relationship as a trustee relationship. As the lawyer will tell you, a trustee generally is one who is entrusted with the resources or title to goods held in behalf of a beneficiary, and oftentimes the beneficiary is young, immature, or incompetent or non compos mentis. Is that the relationship we have? Is it the United States as trustee with a non compos mentis or incompetent beneficiary?

Mr. JOHN. Sir, that seems to be the way it is perceived and, in may respects, I look at it a little differently in terms of the experience this country has had, for example, in its world war experience.

The **Chairman**. Is that the way it should be?

Mr. **John**. There was the Marshall Plan, you know. When the United States won the war in Europe there was a Marshall Plan that went to help restore those countries, to give them assistance and development. We often look at the relationship between the U.S. Government and tribal governments in that fashion.

Mr. **Dean**. Mr. Chairman, I think that the changing concept of the trust responsibility is part of what the problem is with implementing Indian self-determination. The agencies that have worked with Indian tribes for many years perhaps too much retain the concept that the role of the Federal Government is there because Indian tribes are basically not capable of making decisions for themselves.

It seems to me that the Congress has made very clear that it does not view the relationship in that way.

The **Chairman**. Before the Congress amended Public Law 93-638, the language that we are considering states as follows: "The Secretary of the Interior and the Secretary of Health and Human Services shall each, to the extent practicable, consult with national and regional Indian organizations to consider and formulate appropriate rules and regulations to implement the provisions of the title." That was what the language used to be under the old law.

The amendments we passed say the following: "The Secretary shall consider and formulate appropriate regulations to implement the provisions of this act with the participation of Indian tribes."

With every intent and deliberately this Congress crossed out the four words "to the extent practicable" and replaced it with the word "shall." We crossed out the word "consult" and we used the word "participation." And, in our committee report, we made it clear, and these are the words of the Congress of the United States: "The new regulations shall be prepared with the active participation of Indian tribal governments and organizations."

Do you believe that the intent of Congress has been carried out by the agencies involved in the government of the United States?

Mr. **Allen**. In my opinion, no.

The **Chairman**. Mr. John.

Mr. **John**. I believe it is in its fledgling state. There has been movement, but it is a new experience. It is only starting to blossom.

Mr. **Dean**. Mr. Chairman, I believe that there has been a partial compliance and that the two workshops in Nashville and Albuquerque which resulted in this draft of April 3 clearly involved the active participation. Some Federal representatives told us you can't have a room full of 300 people drafting regulations, and I think those two meetings proved that that's not correct. The Indian people, with the assistance of the Federal people and lawyers and others, have, in fact, done that. And the work has really been largely done.

There remain some items that we mentioned here and some that we haven't mentioned that still need to be resolved, but there is a set of regulations for both agencies that is in existence and simply needs to be refined.

The **Chairman.** Chairman Allen, you have suggested that the time be extended?

Mr. **Allen.** At this point, no. The current schedule says that the regulations should be completed by next August—1990. We feel that that can be shortened. It could happen a little bit quicker. But we do not want the schedule to be shortened to not allow the active participation of the tribes in development of these regulations.

The **Chairman.** You said that you do not believe that the intent of Congress has been carried out. Are you telling us that you have not been given the opportunity to participate in the promulgation of regulations?

Mr. **Allen.** I need to concur with Mr. John and Mr. Dean in that there has been some participation. The frustration is in the nonacceptance of the active participation relationship with the Bureau. That is what we need. We need assistance to get both the Bureau and IHS to work together with us to conclude this process.

The way it is currently set up, they will promulgate these regulations and we will have to try to modify them through the consultation process. We feel that the need for the tribe to sit at the same table with the Federal Departments to resolve the details is critical to assure that they come out consistent with the tribes.

The Federals have said that these regulations are for them as much as for us, and we don't disagree with that. But our problem is that it is for us primarily, and if we are not at the table working out the details—and details can mean a big difference in the way this is implemented—that's going to be critical to the end result. After the conclusion of this process it is very difficult to modify it, so that's why we're very concerned about this process.

The **Chairman.** On several occasions I have made public statements suggesting that for too long the relationships that exist between the Congress and the Bureau and the Service have been adversarial in nature. I have also noted that the relationships, for the most part, existing between Indian tribes and organizations and the Bureau and the Indian Health Service have been adversarial in nature as well. I think this has gone on too long. I think the time has come when we should improve upon this.

It has been said by many of my colleagues in many debates that one cannot legislate friendship and amity and love. We cannot legislate an amicable relationship. And I believe to some extent that is true.

We can tighten up the language, but I would hope that that would not be necessary.

I call upon our new assistant secretary, who will be appearing before us shortly, to get together and begin a new era, because you can have all the laws and all the amendments, and if both sides decide to bring out their knives, nothing is going to happen.

Unfortunately, there is very little understanding and concurrence on what the relationship should be like. I am sorry to say that, the way I look at it, it is an adversarial relationship that exists today. It is not one of a trustee with a competent beneficiary, nor is it one of a sovereign and a sovereign, and that's the way it should be.

I thank you very much, sir.

Our next panel consists of: The Honorable Edward Thomas, president of the Tlingit and Haida Central Council of Juneau, AK; the Honorable Laurence Kenmille, councilman of the Confederated Salish and Kootenai Tribal Council of the Flathead Reservation of Montana, who will be accompanied by Mr. Thomas Acevedo, Esquire, tribal attorney; and Ms. Dorothy Dupree, finance officer of the Pasqua Yaqui Tribal Council of Tucson, AZ.

President Thomas.

STATEMENT OF HON. EDWARD THOMAS, PRESIDENT, TLINGIT AND HAIDA CENTRAL COUNCIL, JUNEAU, AK

Mr. THOMAS. Good morning, Mr. Chairman.

My name is Edward Thomas. I am the elected president of the Tlingit and Haida Central Council of Juneau, AK. Greetings from Alaska.

I wanted to take a few minutes to again thank you and the members of this distinguished committee for providing for us Public Law 100-472, of which title III is a part.

I think this particular act provides many opportunities to streamline the bureaucratic process, to improve the relationships with the tribes in the area of contracting, and for Indians to realize a higher degree of self-determination, and for that we thank you.

Before I begin my comments directly related to the demonstration project, I wanted to echo some of the earlier comments, particularly in the area of regulation development.

I did attend the meeting in Nashville. I did not attend the meeting in Albuquerque. I, for one, appreciated the efforts of the government agencies in trying to be more accommodating in the development of the policy; however, I do have some concerns about the changing of the time frames that were originally established in the act, itself.

I, for one, have resisted throughout, regulation development process that we needed, to be so complicated in carrying out the letter of the law. I think that we have demonstrated under title III that we can function. We can carry out the intents of Congress without many of these regulations being promulgated.

I realize that there are parts that need higher scrutiny. I realize there are things that need to be done in consultation and working together. But I think where the law is very clear on what needs to be done, particularly in the area of funding, including the change in the fiscal year, the title III demonstration projects, the indirect costs, I think all of those things can be implemented immediately. I don't think we need to wait and wait and wait until everybody can somehow agree. Any time you recommend change, as this law is recommending, there is going to be conflict and there are going to be adversarial feelings for a while until the dominating body takes charge, and that, of course, I hope is the Congress.

Now, I realize that they're recommending that we wait until September 29 to have the notice of proposed rule making begin their review process. I think that's far too long. I think it should start now. The draft regulations, for the most part, are out. I think we can analyze them pretty quickly and get on with the business of implementing the law. If we don't have complete concurrence, we can work on those later.

I think that in these final moments of promulgation of these regulations I would like to see a little bit more involvement of Congress in making sure that timeframe consultation is adhered to in line with the intent of Congress.

Also, I think that it is important that the Government gets much more receptive to receiving the recommendations of the various task forces on the Indian priority systems, or IPS system. These recommendations, from what I have reviewed of them and from my participation in the Alaska area workshops, are very good recommendations and could be very helpful in dealing with the concerns that many tribes have over the funding.

Title III, or the demonstration project, is a very important tool to many of those demonstration tribes to investigate efficient methods of contracting for Federal programs by tribal governments.

I think that one of the benefits of going through a demonstration program is that you can go and try out something without having to change the law of the land and accomplish much more by looking at something through a demonstration mode.

In my project, for example, I proposed that we get rid of the Southeast Agency and convert those administrative dollars into program dollars that would help the needy people of my tribe and other tribes of my agency.

This proposal creates conflict because when you are recommending those changes, you are talking about displacing career people in the Bureau of Indian Affairs. For many of the people in my agency, those are our tribal members, also. So we're talking about conflict that is not comfortable, but yet we must go through because many of the people in my area that need these services do not get the degree of services necessary to make changes in their lives that are going to be positive for the future.

Now, some of the things that have happened—and I won't dwell on some of the negatives because I think there are a lot of positives, but the negative would be as a result of this conflict if the Bureau got quite defensive. We have had delays upon delays of getting the base funding for both phase I and phase II of our projects. This has created problems more related to the reporting to Congress as prescribed by the law, and I don't put this forth as an excuse, only as reality. Last year we didn't get the funding until the middle of May, and our first report was due April 1. You can see that it is pretty hard to meet the reporting requirement on your project when you get funding after you are supposed to have submitted your first quarterly report.

The Government has been very slow in reaction to the requests of nearly all of the demonstration tribes—particularly in the area of finance. I struggle with being overzealous and saying I don't see how the Government can function when it doesn't even know its own financial status, or an agency can function, or an area, or even central office. It seems to me, from my experience, that it would have to have that information readily available at all times, and therefore to pass it on to somebody else should be a very simple process. But it has taken us just about a year and three months to get our final, unbanded report from the Bureau of Indian Affairs in Alaska.

I have reviewed that information, and it still does not look complete, because I was able to get some other information when they were talking about reorganizing the Bureau, and therefore I think my information is still incomplete.

Also, what is happening in some of our areas is that the Bureau agencies are campaigning in opposition to the policies not only of the Congress, but of their particular offices—campaigning against demonstration projects, campaigning against more modifications to the way we administer our programs.

The CHAIRMAN. How are they campaigning?

Mr. THOMAS. Campaigning by going to other tribes and saying that if we got rid of the Southeast Agency, for example, that if they, themselves, wanted to get into another contract by themselves there would be no technical assistance for them because there would be no agency. Yet, to clarify that and say that technical assistance is not a tool only of the agency, but of the Federal Government, it is pretty hard to dispute that when they have all the figures and the resources to go out and do that campaign.

So that is one mechanism.

The dominance of a larger tribe like mine in the area is brought forth in the various councils of the smaller tribes saying that we can't have the dominance within an agency. That would be negative in the long run. That kind of campaigning is what is going on in my area.

And then some personal campaigning with other members saying that I'm a tribal member, so why should I be displaced because of the demonstration program.

One of the positive things that have happened as a result of title III is that we have, in spite of the fact that it has been very slow, been able to get information that will allow us to do a financial analysis on all of these levels of Government, and this analysis has confirmed the suggestion that the BIA has been overburdened at the administrative levels, and that the cost is phenomenal compared to the services that we actually get out to the people.

We hope that working together we can remedy some of that.

Another positive thing has been legal and historical analysis done by the various tribes. Many of the tribes are concerned that by getting rid of one or two layers of Government agencies that we somehow diminish our relationship—the government-to-government relationship that was spoken about a little earlier.

Our legal work has shown us that that is not necessarily true, nor does it have to be true. We can, in fact, eliminate various levels of Government agencies and still maintain our government-to-government relationship.

Another positive thing is that by being a part of the demonstration group, we have been asked by other tribes, not only in our own area, but throughout other parts of the country, in the development of regulations as to some of the experiences that we have had that would help lend some insight into the development of regulations. I think that was very positive.

Indirect costs—I need to stress that these programs all need indirect costs. Simply because they are a demonstration or a separate purpose does not minimize the need of the tribal Government to have resources to manage those particular programs. I think, while we're talking about indirect costs, I would propose that all programs equally get indirect costs, including ICWA and HIP—other programs that have historically been left out.

I think that indirect costs are the lifeblood of many tribes, and I think that Public Law 100-472 has time and again stressed the importance of indirect costs to tribes. I hope that we can move past having various programs exempt from indirect cost pools.

Like you, I believe that title III, as well as other amendments to Public Law 93-638, must lead to permanent improvements in Federal contract policies to Indian tribes. Otherwise, I feel that this process and the process that we are experiencing in our demonstration project can, in fact, lead to more polarization between tribes and Federal agencies. I think with the limited resources that we have, we cannot afford to have any more polarizations and expending large amounts of energy, resources, fighting with each other over jurisdictions, over various ambiguous policies, delays in funding, and other things like that.

I think it is very important that we begin with the idea that we are going to get into a much better relationship for the future.

I was to talk a little bit about the liability insurance, and I believe we have other experts here that will do a much better job in that. I will briefly say that my tribe is very interested in the amendments that provide for the Government to work with us to get better insurance to our tribes in the area of liability and other types of insurance.

We do endorse the Government doing a little bit more. I think they need to publish lists of people that are interested in providing reduced rates to the tribes. In my State, we are quite isolated. We need more information about insurance companies. I think many other isolated tribes may be faced with that very same problem.

I think that the Government should coordinate and try to attract insurance companies to workshops concurrent with national Indian organization meetings. By doing that, I think we can capitalize on the fact that many Indian tribes are already at those meetings, and that by providing them more information about insurance, I think that would help all of us become more familiar with some of the options available to tribes in the area of insurance.

One of the important concerns that tribes have, however, is that as you get into insurance and self-insurance, whether to form your own insurance company, how do you deal with the issue of waiving your sovereign immunity. I think that we need help in that area, and I hope we will hear more about it here today.

But I think that it is important that we continue to work with the administration, as well as Congress, in trying to find ways to address the area of waiving sovereign immunity so that we can insure ourselves against liability.

In closing, Mr. Chairman, I had hoped that, like these cleansing rains of today, these amendments would cleanse the process that tribes go through in order to contract, and I think it can. We all know that we're going to get a little wet, but I think the final resolve should be—and I hope will be—that we are going to start a fresh, new approach to working together for the benefit of all of our people.

Thank you very much for this opportunity.

[Prepared statement of Mr. Thomas appears in appendix.]

The CHAIRMAN. Thank you, Mr. Thomas.

Mr. Kenmille.

STATEMENT OF HON. LAURENCE KENMILLE, COUNCILMAN, CONFEDERATED SALISH AND KOOTENAI TRIBAL COUNCIL, FLATHEAD RESERVATION, PABLO, MT, ACCOMPANIED BY THOMAS ACEVEDO, ESQ., TRIBAL ATTORNEY

Mr. KENMILLE. Thank you, Mr. Chairman and members of the committee.

I bring greetings from the Salish and Kootenai Tribe of the Flathead Nation.

We have had a good description of the background of self-governance. The way the tribes are approaching self-governance is very, very cautiously. It is a new era that we will be looking at in a relationship with the U.S. Government and the Confederated Salish and Kootenai Tribe.

The process that we are looking at in self-governance is sort of redefining the process that we have had before. We have always looked at it, from the time of 1855, where we have had a true government-to-government relationship in defining our treaty and working out that relationship. From that point on, it has been declining.

The way we look at self-governance is that it is a new era, and in this new era we are going on a government-to-government relationship.

The tribes, themselves, have made significant strides in trying to work out this relationship of self-governance—how it is going to be affecting our tribes, and how it is going to be affecting the Bureau of Indian Affairs.

We want to make sure that every avenue is addressed so that my tribal people are protected and the United States Government still has that relationship of fiscal responsibility in the funds that they do give the tribe that we are requesting.

The investments that we have made have been long hours in council meetings, we spent four and a half days, we have made extended reports to Congress previously on how we have progressed, we have also made them available to other tribes, we have made up a consolidated budget that would be not only looking at the IPS sections of the Bureau of Indian Affairs budget.

Our ideas of self-governance are far-reaching into the efforts of the amounts that are being spent in the Bureau of Indian Affairs in comparison to the tribe.

We are looking at consolidating the budget and how much money the tribe is putting in, the Bureau of Indian Affairs is putting in, and all other agencies, so that we can get an overall view of where those needs and priorities have to lie.

It is a very difficult process. It is a long process. But we know that this process, in the end, will be beneficial to all.

One of the problems that we have run into is the funding parameters—what the tribal government needs and what the Bureau of Indian Affairs has in the contract is very, very difficult to work with. We have to make it more broad.

The definition of how the Bureau of Indian Affairs is looking at it at this present time is just the IPS portion of it. We just can't look at it similarly—if it is going to be a workable program we have to look at it totally, and not only the IPS, which only consists of about 25 to 40 percent in some instances. Approximately 60 to 75 percent of the budget is not actually being looked into in the self-governance program that should be related to the tribes, and must work in the relationship in that way.

The process that we are looking at with the Bureau of Indian Affairs would be a true transfer model where the tribes would be taking into consideration all the aspects and then having these models transferred over to the tribes with the Bureau of Indian Affairs having their input.

But, at the same time that we're doing these transfer models, we have to, in our own words, get our own tribal house in order. And how we're revealing that is that we're looking at each portion of our department and how they are fitting in with the Bureau of Indian Affairs—forestry, natural resources, general assistance, IHS, a variety of programs that are handled under the tribe, and how they intermingle with the Bureau of Indian Affairs and all the other agencies within the reservation.

Our tribal secretary and tribal treasurer at this point in time are developing a fiscal plan that would be providing those departments, how those will be intertwined, and where those moneys are coming from, and making a multiyear budget that would be consistent with the self-governance projects as we go along.

The way we're looking at this is that when we first started this process, Mr. Chairman, it was kind of like looking at a shotgun marriage. The Bureau of Indian Affairs wanted to give us all of this and get us going on it.

But we're looking at this process right now as sort of a prenuptial agreement where we are looking at each side and we're saying, "This will be your responsibility. This will be our responsibility." And as we go along, maybe we will not be villains to each other, but we will be advocates to each other, as it used to be in the early stages of the Confederated Salish and Kootenai Tribes where they used to be a helpful hand and we used to be a helpful hand.

Maybe as we go along, we will have this sort of marriage so that they will be taking the considerations of the U.S. Government's responsibility and the tribes will be accepting their responsibility as a nation to their people.

We have come a long way since the beginning of this project, and we have a long way to go. We do have a lot of people working on it. We have all of our resources people working on it. We also have a consultant, Chuck Johnson, who does all the gathering of the information from outside of our area and brings it in and gives a report to the tribal council.

As I stated before, the tribe is looking at a multi-year consolidation of all of our resources. I feel that when we do the consolidation of those resources, that the tribe has to be the forerunner in making the rules and regulations with the advocacy of the Bureau of Indian Affairs reviewing them.

As we looked in the past, the Bureau of Indian Affairs has made rules and regulations without really responding to the tribes' needs.

We, on the reservation, are the Flathead Nation. We know our needs and have our priorities established. We loose them when we go through the Bureau of Indian Affairs' IPS system. They are lost. After we make our priority system, they go to the Bureau of Indian Affairs and they are all mingled together and they are lost.

The way we see this agreement working is that the tribes will take on the responsibility of doing the prioritization in response to the need and the dollars that are available. If we feel that there are more dollars needed, the priorities will be justifying where the tribal dollars will have to go.

We are not against putting in our own dollars and supporting our tribal needs. We are minimal in what funds we do have available, but as we look at it, there are some responsibilities that this tribe has to pursue, and one of those things is to make sure that we are self-governing our people's needs and resources.

As you know, we have taken on a lot of responsibility in other areas such as shoreline protection, natural resource stream life protection, and we have handled it very well working with the residents of the reservation--not only Indian, but non-Indian, as well.

I would like to read the five areas we will be pursuing. In these five areas, Mr. Chairman, we want to know if those recommendations that we are making—the process that we are going through—will be those satisfactory to or in conjunction with what the Senate has address in our direction.

The first one on the recommendations is that Congress interpret the self-governance transfer model broadly. We have a lot of areas that, in relationship to the budget, we are not getting the information well, we want to have the transfer, the capacity, the technology, the authority, and the range of the budget all included in the interpretation of this self-governing transfer model.

We recommend that Congress mandate BIA to participate in the Confederated Tribes' consolidated budget system. That process is that we will be developing the system, and the Bureau of Indian Affairs will then come to the tribes and review those systems with the tribe to see that they are in comparison with the statutory requirement that the Federal Government has in those specific areas.

We recommend that Congress support the tribes serving as the lead management agency for other Federal funds that pass through the Bureau of Indian Affairs when the tribes cannot demonstrate capacity to serve and lead in the priority-setting role.

Now, when we get into that area, we find that the BIA has not fulfilled its obligations through its intergovernmental affairs, nor has it provided full and timely information to the tribe. A lot of times the tribes receive outside funding other than the funds funnelled through the Bureau of Indian Affairs, and we do not receive the initiative information until it is too late or we have to scramble to get things put together so that we can meet those requirements to receive funding for certain needs of the reservation.

Fourth, we recommend that Congress mandate within the self-government compact minimum feasibility allocations to the agencies or reservation level of all technical and financial resources that are of benefit to the Flathead Indian Reservation.

Fifth, that Congress require the BIA to act in compliance to and confront with tribally adopted comprehensive plans that are incorporated in the self-governance compact.

What we are asking in number five, Mr. Chairman, is that we want the Bureau of Indian Affairs to get with us prior to any of the settings of the rules and requirements that will be set forth by the tribe and by the Bureau of Indian Affairs. There are a lot of statutory requirements that they know about but, as we progress, they don't bring it up to us until at the end of the process.

We want the Bureau of Indian Affairs to make sure that they work with the tribes in this area—research some areas first, and, as we progress, bring those statutory requirements to the tribes and then we will progress from there in meeting those statutory requirements.

At this point, Mr. Chairman, I would like to relinquish my time and have Tom Acevedo, who is the tribal attorney and also the person of the panel to talk about the risk insurance.

The CHAIRMAN. May I assure you at this stage that your five recommendations appear to have much merit, and we will study them very carefully.

Mr. KENMILLE. Thank you, Mr. Chairman.

[Prepared statement of Mr. Kenmille appears in appendix.]

The CHAIRMAN. Mr. Acevedo.

Mr. ACEVEDO. Mr. Chairman and members of the staff, I'm happy to be here this morning and to have this opportunity to speak with you about that portion of this hearing on insurance.

Let me sort of just touch briefly on what Councilman Kenmille and Chairman Thomas talked about in terms of self-governance and self-insurance.

We feel that the liability insurance provided in the 1988 amendments to the self-determination act is but a spinoff or an attendant part of this self-governance concept in terms of moving on to this new era that you crystallized in terms of your conversations this morning with the previous panel.

The idea of self-insurance or providing liability insurance for the tribes, and the tribes taking on that obligation themselves, in some fashion, now creates a further opportunity for tribes to be self-sufficient and in creating a new vehicle which we think will, as time goes along, be an investment vehicle for tribes and also provide economic development funds that could possibly grow out of that investment.

That idea is the sort of the underlying theme of where we'd like to go with self-insurance for tribes.

Let me back-track as to how we got to where we are today.

First of all, I am here in my capacity as chairman of the board of directors of the Double Eagle Insurance Company. It is a risk management company, that was formed by a group of tribal leaders who saw the opportunity by the amendments that Congress enacted in 1988 to the Self Determination Act, providing that the burden of providing liability insurance for tribes who contract in the Public Law 93-638 programs, would now have those premiums provided for by the Federal Government through the Bureau of Indian Affairs.

The second component of those amendments is the new language that we appreciate very much which exists in the new law is: "The Secretary shall, to the greatest extent practicable, give preference to coverage underwritten by Indian-owned economic enterprises." The latter part of that sentence adds "such enterprises may include nonprofit corporations." This is the new addition in the act.

We seized upon the opportunity of nonprofit corporation for the creation of a risk management company that could provide coverage to tribes who enter into Public Law 93--638 contracts with the Federal Government.

The idea behind forming a nonprofit corporation was one in terms of attracting tribal interest nationwide. We felt that if we were engaged in a profitmaking corporation that we would somehow create an impression that certain tribes were in this for a profit motive and not one of trying to provide low-coverage risk insurance to the members and provide a good service to those members. So the concept of a nonprofit company was one that was embraced.

The integrity of this new company I think is spoken for by the people who are participants in it. One of your distinguished panel members this morning, Mr. Lionel John, is one of the officers of the corporation. We also have Mr. Jasper Hostler, who is a member of the Hoopa Tribe and is the tribal vice chairman, who also sits on the corporation as one of its officers. We have Mr. Tom Lone Eagle from the Big Pine Shoshone Paiute Tribe, he is the chairman of that tribe, and sits on as one of the officers of the company. And you have Dorothy Dupree, who sits next to me, and is our CEO of the company.

So we have people of high caliber and quality that can be trusted and who are looked to in Indian country as leaders and who can provide direction for providing competent insurance coverage to tribes across the United States.

Mr. Thomas I think asked the question in terms of his concern of how tribes can protect themselves if they have to waive their sovereign immunity.

As you know, when tribes contract with the Federal Government in the Public Law 93-638 program, there is language that has existed in the previous act and now exists in this act that says that the insurance companies who provide insurance shall not assert the defense of sovereign immunity that the tribe enjoys.

I think that partially answers Mr. Thomas' question about how you waive that. How you waive it is through the type of coverage that you secure from the particular company, and the scope of that coverage, then it depends on the scope of the waiver, so that if it is not a universal waiver then the tribes' limited treasuries cannot be threatened by major lawsuits.

The other component that we're looking at is putting cap on recovery, but still providing legitimate insurance coverage to people who are injured and who need coverage as a benefit to them. As you know, state legislatures are now wrestling with that very concept, themselves.

Tribes, because of their sovereign immunity, in the past have not had to address the question in terms of liability in this area and have shielded themselves behind sovereign immunity. They now have the opportunity to provide insurance to those people who are, in terms of fairness, who have suffered an injury, but also not to make those insurance recovery claims outrageous and have tribes assessed excessive damages.

Tribes, as sovereign governments, can set what those ceilings are and determine the scope the kind of coverage.

We think that is one way that our particular company, because of our unique understanding of tribes and tribal governments and working with them, in terms of the underwriting requirements, can present those to the tribes and allow them to make those items part of their consideration for participating in this risk management pool.

The other method of controlling costs is that the tribes, themselves, are directly self-insuring by being within the scope of this pool. As a consequence, they will be able to keep the premiums down because they will be able to control the scope of claims and have more of an incentive to do so.

We think that the concept of going out and simply contracting with existing major carriers doesn't afford that opportunity at all, simply because those carriers don't have the same incentives that the tribes do. The Tribes are providing coverage, and in doing so they do a general, across-the-board risk management assessment, and then set the premium at the particular given level.

The concept of a tribal risk-management pool is separate and distinct from general insurance and has greater merit, in our mind.

I would like to have Ms. Dupree, who is our CEO, explain some of the technical concepts in terms of what risk management is all about so that this committee and yourself have a fair understanding of what we are and what we are able to do.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Acevedo appears in appendix.]

The CHAIRMAN. Ms. Dupree.

STATEMENT OF DOROTHY DUPREE, FINANCE OFFICER, PASQUA YAQUI TRIBAL COUNCIL, TUCSON, AZ

Ms. DUPREE. Thank you, Mr. Chairman, for your invitation to present testimony to Public Law 93-638 and the changes afforded thereof by Public Law 100-472.

In October 1988, the CRI came to work for the Pasqua Yaqui Tribe as their finance director. This is the beginning of the involvement that I had with the amendment to Public Law 93-638.

The issue that I immediately recognized as being somewhat of a significant issue was that of liability. My previous capacity before becoming the finance director was a corporate risk manager for a large, international corporation.

Realizing that the requirement that the Secretary provide the liability for tribes in the process of Public Law 93-638 contracting was a small victory for tribes because they no longer had to bear the high cost of liability. As we all know, with liability the costs have been escalating over the last 10 years. There does not seem to be any, aside from Federal legislation, resource to do away with that escalating cost.

The problems that I noticed immediately are two that were very significant in the new requirement. The first is that no one could tell me where the funds were coming from to pay for the premiums of a liability policy. We can only assume, in a worst-case scenario, that those premiums would come from Public Law 93-638 contracting funds. Tribes have a difficult time, as it is, with the little money that they do have to provide quality services to their reservation's tribal members.

The second major problem is the segregation of those liabilities, because tribes operate on an integrated basis, not only Public Law 93-638 programs. Pure tribal liability programs is what I'd like to call them. You are intermingling your personnel, your space, and your resources to provide your services.

It is very difficult, without tribal input, to segregate adequately those liabilities.

Tribes have been very concerned that there has been inaction on the part of the Bureau of Indian Affairs and IHS. When I've questioned representatives of IHS, they have deferred to the Bureau of Indian Affairs with the explanation that the responsibility for the liability mainly lies with the Bureau of Indian Affairs because the exposures are in those Public Law 93-638 contract programs, not with the medical services that are covered under Federal Tort Claims Act.

The Bureau has taken two actions in leading toward the implementation. First, they have contracted with Marsh & McLennan, which is a large, national insurance broker, to do an analysis of what it would cost to write a national insurance policy.

I have had a chance to review that analysis. There are two distinct pitfalls to that analysis. First, as I referred to above, there is no tribal input. The key tool in determining the exposures of any liability is to analyze the program administration methods and whether or not there are good quality-control procedures in place of the administration of these programs. That was not included in the analysis.

The second major pitfall to that analysis is that there is no claims history, therefore they have no data to back up what it is that they've analyzed.

The second action that was taken by the Bureau of Indian Affairs was to request the 1-year extension in order to further investigate what they could do with the liability problem. Tribes being concerned called a meeting in Albuquerque in March 20. Out of this meeting there was an interim board of 18 representatives across the United States who have two goals: First, was to develop a regulation to implement—and that regulation I have attached to my testimony—self-insurance and risk management companies representing the membership of tribes; the second goal was to investigate the nonprofit development of a self-insurance risk management company.

On May 1 and 2 we had a second meeting in Denver, CO, at which we incorporated Double Eagle Risk Management, Inc., under Salish and Kootenai law in Montana.

Double Eagle since then has sent a letter to the chairman of the House and Senate Interior Appropriations Subcommittees requesting that $6.5 million—which, by the way, is $1 million over the estimate of the Marsh & McLennan analysis—requesting that that be added to the Bureau of Indian Affairs indirect cost funding to be earmarked for Double Eagle Risk Management—$1 million of that to establish our initial reserves, and $5.5 million of that to contract with tribes in providing their liability coverage.

We formally would like to request your endorsement of our letter to the Appropriations Committee.

We truly believe tribes can insure and that it will be at a lower cost in the long run to the Federal Government. It will take a 3- to 5-year reserve pool build-up period, and after that the cost to the government should be very minimal.

DOUBLE EAGLE RISK MANAGEMENT

What is risk management? Risk management is a process whereby risks and exposures are identified, measured, and treated. One of those treatments is self-insurance. One other treatment is traditional insurance placement. Another treatment is loss prevention programs to reduce or eliminate risk.

The benefits of pooling are evidenced by government municipalities and large corporations. There are two characteristics that you need to meet in order to form a successful pooling concept: you need to be diverse in nature, and you need to be large in number. I believe that tribes meet those requirements.

Tribes benefit from risk management through Double Eagle or a tribal membership risk management company by a number of ways. First of all, they can design their own coverage; thereby, they are sensitive to each tribe's needs. They are provided loss prevention and control programs to reduce the exposures on reservations. They still have control over the claims litigation, which I believe is one of the most important points of self-insurance. And the dollars stay within Indian country.

Those dollars do not go to a non-Indian insurance company to add to their profit margin. They can ultimately serve to provide investment money back into Indian country for economic development.

To my testimony I have added three charts. Chart FA shows the interrelationship of the Public Law 93-638 liability participants. Chart FB is a two-tribe model that segregates the liabilities by activity level and demonstrates the treatment of how those would be insured. FC is a second two-tribe model that isolates the activities by activity type.

This committee's assistance is vital in two ways: First, to exercise your leadership with the Appropriations Subcommittee to secure funding for companies like Double Eagle; and, second, assistance that is vital is to direct BIA and IHS to prioritize the formation of self-insurance pools.

We look forward to your support and endorsement of our company.

[Prepared statement of Ms. Dupree appears in appendix.]

The **Chairman.** May I assure you that your request for additional funding will be very carefully considered and appropriate action will be taken.

Ms. **Dupree.** Thank you.

The **Chairman.** Some of us are also members of the appropriations committee.

Do you have any cost estimate as to savings that may be realized from this risk pool operation?

Ms. **Dupree.** The standard estimate of savings that municipalities and corporations have enjoyed is approximately 10 percent. That 10 percent is what would go for pure profit to insurance companies. That, instead, would, due to our nonprofit nature, be a savings.

The **Chairman.** A 10-percent savings?

Ms. **Dupree.** Right.

The **Chairman.** We believe that it would be much larger than that.

Ms. **Dupree.** Well, it ultimately would be. The problem that we have right now is that there has been no gathering of data on a composite basis of tribes and their exposures; therefore, it is difficult to determine the amount of money that is going to be required—not the amount of money, but the amount of coverage that is going to be required compared to the activities out on reservations and through the tribal contractors.

The ultimate savings would be tremendously more. An example of this is: Let's say we have a 5-year analysis going on. If the liability were to be placed on the conventional insurance market, you would be paying and using the Mash & McLennan estimate of $5.5 million. You would be paying that company $5.5 million to provide a conventional national insurance policy; whereas, that same amount would go to Double Eagle Risk Management Inc. in year 1. In year 2 you would have $5.5 million, and possibly more because by then they would have a little more experience and, as you know, they charge more when they realize the number of risks that are out there. So again, in year 2, $5.5 million goes to that insurance company and $5.5 million comes to Double Eagle.

In year 3, $5.5 million goes to the insurance company. In year 3, $5.5 million goes to Double Eagle.

In year 4, $5.5 million. In year 4, zero to Double Eagle because by then, using the estimate that it takes 3 to 5 years to establish an adequate reserve to cover your liabilities, we would no longer need the funding, whereas, in the conventional insurance market, it is a yearly expense.

The **Chairman.** As a general rule, laws and ordinances and regulations and rules are applied and administered uniformly. Over the years, Congress has noted that this uniform application may oftentimes place into jeopardy certain segments of our society because the people that have to live with the rules are not uniform in nature. You have very powerful and wealthy people, wealthy groups, and then you have very weak, inexperienced, impoverished people.

And so, as a result, communities and States and localities have adopted legal services for the poor, they have adopted public defenders for others, ombudsmen in some communities. Even on the international scene the world bank has what we call a soft window, where so-called less-developed countries can borrow money at concessionary rates.

I have mulled over this, but what do you think about a similar type of arrangement for Indians? Obviously, you have very powerful Indian nations, a large population with many resources, some very wealthy. On the other hand, you have very poor, small nations and rancherias, as well as nations and tribes in Alaska and the Arctic Circle with no lines of communication, no roadways. In some areas, there is one community health assistant and no physicians or clinics, as you will find.

Do you think it would be well if this Congress considered the creation of special groups to assist less-prepared and weak nations?

Mr. THOMAS. I think you're right on target. I think that the availability of resources for the purposes of insurance and other costs of that nature are very difficult. I think if we had a soft window, so to speak, not only in the area of insurance, but economic development and other things that would take us past the pure management of service contracts, I think that is the proper direction to go.

Mr. ACEVEDO. Mr. Chairman, from Salish and Kootenai we think that it would be an excellent thing for the Congress to consider. I think Mr. John and the previous panel mentioned something about a Marshall Plan in terms of how he views the relationship between the United States Government and Indian Tribes, and your suggestion is along that line. It would be something that would be of great assistance to tribes.

Senator INOUYE. The only reason I brought this up is that whenever you establish an ombudsman office, it is suggested the relationship is a rather adversarial one. You need someone to be your advocate, for example. But you think it is something that has merit?

Mr. KENMILLE. Mr. Chairman, I think tribes across the Nation advocate on behalf of a lot of other tribes in helping them progress. When a tribe has progressed further than another tribe, the way the Salish and Kootenai Tribe looks at it is that we are not so far ahead that we can't reach back and help somebody else come up with us. That's basically how the insurance company would be working.

Right now you look at Public Law 93-638 and the contracts that they have there, but as time expands it can go into much more depth of insurance and taking up the responsibilities of what tribes want in an insurance company.

So as we go along, tribes will help each other out. When one progresses, another tribe will reach back and help the other tribe progress.

The CHAIRMAN. Well, I thank you very much.

As you indicated, Congress should monitor, especially at this time, the implementation of this law. I can assure you that this hearing is just the first of several. We will be monitoring the implementation of the amendments very, very carefully because we are involving ourselves in a relatively new area. And we shall occasionally call upon you to assist us in keeping us up to date as to how it is coming along.

Thank you very much.

Our third panel consists of the following: Mr. James Sizemore, a CPA with the Warm Springs Tribe of Portland, OR; and the Honorable Twila Martin-Kekahbah, chairman of the Turtle Mountain Tribal Council of North Dakota.

Who wishes to go first?

Mr. SIZEMORE. Mr. Chairman, I have been invited to go first, so I will.

STATEMENT OF JAMES SIZEMORE, CPA, WARM SPRINGS TRIBE, PORTLAND, OR

Mr. SIZEMORE. I wish to thank the committee for the opportunity to discuss the appropriations process with you.

In my 13 years in the Indian business, I have had the task of analyzing the Bureau of Indian Affairs' budget and the Indian Health Service budget each year and attempting to convey to the tribal council at Warm Springs what they mean and what the impacts of those budget justifications are or would be on the tribe.

I would liken that to waking up from a nightmare. It is sort of disorienting. It is very difficult to go through those two documents and determine what they mean to an individual tribe.

I have submitted written testimony, and I will basically walk through it.

I would like to highlight three points that I think are important.

First, tribes are rapidly developing very effective and sophisticated governments, yet the tribes are not recognized as governments in the present appropriations process. The processes are currently more geared to provider/recipient relationships.

Under Dr. Rhoades' leadership we have seen an attitude in the IHS that is more supportive of government-to-government relationships. Whether they can convince the higher-ups is yet to be seen, but we do appreciate their support.

The second point is that the Indian priority system utilized by the BIA was designed to support and complement self-determination. It could have been an effective process if properly utilized and honored. Unfortunately, that has not been the case.

The third point I'd like to make is that a true government-to-government relationship would require that an appropriations process be rooted in law. The present process is not. In fact, it is not even in regulation. It is in the manuals of the agencies and can be changed by the agencies or staff within the agencies without any involvement by the tribes or the Congress.

This committee recognized that fact and, in the Self-Determination Amendments, asked for a report on the Indian priority system and the appropriations process. I worked with the group in the Portland area, and we decided that our report would be an educational document and that we would attempt to provide a tool to Congress and tribal leadership. It consists of an analysis of the Indian priority system, the history of the system, the problems with it, and recommendations for what an appropriate government-to-government process should look like.

I have attached to my testimony the executive summary from that report.

I have also looked at the reports from all of the other areas around the country and find that the feelings about the process and the system are very consistent among Indian tribes.

The system, as it stands today—or what is left of the Indian priority system—is now 19 years old. It was developed following President Nixon's announcement of the new self-determination policy.

At Warm Springs, the system has been used to integrate and coordinate services with the agency. Each year the tribe works with the superintendent to coordinate program activities and to set the priorities. The tribe's budgeting process is dovetailed with the Bureau's budget in order to ensure that basic tribal priorities are met. The tribe has enjoyed an excellent working relationship with the BIA and the IHS at that level and at the area levels—and in headquarters, in many instances.

What I'd like to do now is turn you to a blue attachment to my testimony. The first page of that is basically an analysis of what would be the outcome of priority setting at the agency. Under the present IPS process, tribes are asked to prioritize funding for their programs at the 80-, 90-, and 100-percent levels, and also at the 110-percent level. Once that is done, these amounts are added incrementally from the 80-percent level.

You will note that there is a need column which is blank. The process used to have an ability for the tribes to submit their needs so that those needs could go into a national information base. That column no longer exists in the process. There is no "need" collection.

If I could turn you to the second page, I will explain how hypothetically this system would work.

As you can see, the tribe has incrementally prioritized its funding, and hypothetically, wherever Congress draws the line in terms of appropriations, that would be the funding that would go to that location. That is not what occurs.

If I could ask you to turn the page one more time, I would like to point out a tool developed at Warm Springs which is used for the tribe and the superintendent to clarify the roles and relationships of the tribe to the Bureau and the expectation of the tribal council of the superintendent and his staff with respect to the programs. This is a developing tool used for the last few years. I brought it to you to point out that there is no such tool in the IPS system. The first sets of pages are all that gets to the central office today, so when the central office makes decisions about programs, those decisions are made without any information about the impact on local programs, and the superintendent is not in that loop.

That's a little bit about how the system works—or at least how it was designed to work.

You'll note there are only 10 programs left. Inflation and moving programs out of the IPS have reduced programs. The tribe chooses to fund programs themselves and try to keep what is left of Bureau programs funded adequately.

If I could turn you to page three of my testimony, I'd like to highlight some points about this system. Under the self-determination law, one would expect tribal decision-making would have increased gradually, permitting tribes to take over more and more decision-making. In 1970, over half the Bureau budget was within the Indian priority system—at that time called the band analysis. Today, about 25 percent of the budget rests there.

In 1980, tribes were given a choice of 37 programs into which to prioritize funding. In 1991, there are 29.

BIA has proposed to remove or cut several other programs from the IPS through the budget process, but, fortunately, the appropriations committees have not permitted it. In several cases, such as forestry self-determination grants, the Congress has restored funding, only to have BIA attempt to cut those programs again the following year.

In the case of self-determination grants, the Congress restored a portion of the 1987 reductions in 1988 and instructed the BIA to return those funds to the Indian priority system at the locations from which they were reduced. This was not done. In the 1990 budget, the BIA seeks to cut the amounts out again. It doesn't seem that Congressional wishes make any more difference than tribal wishes.

New charges have been levied against local programs, effectively eating away at the buying power. In the case of facilities, the cost of phones used to be charged to facilities operations and maintenance. Congress saw a savings in that budget. But what really happened is that the cost of phones was shifted to local IPS programs—again reducing their buying power.

Mandatory pay costs have been implemented without additional funding. Inflation has eaten away the resource.

New tribes are added and funds are not requested.

In the Portland area we have tribes who have officially refused to participate in the process because they see it as assisting in cutting their own throat. In the multi-tribe agencies, tribes are unable in many cases to determine what share of the programs are theirs to contract or to reprogram.

If the tribes are to have such a government-to-government relationship through the process and to further develop their own capabilities, there needs to be stability in financing. A constant up and down movement and constantly pulling the rug out from under them does nothing but undermine the process of growth.

Tribes need to have additional flexibility. There are many, many programs authorized by the Congress which tribes are not permitted to prioritize funds into.

I might mention that this flexibility should be extended to the IHS budget. If tribes were able to shift funds within their local service units, you might see an added emphasis on primary prevention activities hopefully, over the long term, shortening the demand on crisis intervention.

There needs to be a reduced competition for funds. The American industry is streamlining, and I think the agencies could do so, as well.

We have Federal statutes that seem to be in conflict. We have an Indian Reorganization Act that calls for tribes being informed about the budget being requested. That law is not being fulfilled today.

The Self-Determination Act would lead one to believe that tribes should participate in the process, but they are locked out while the process is secret during the formulative process.

Finally, there needs to be an equitable distribution of resources. Many tribes have addressed that in their area reports. I think it is unfortunate that the BIA has undertaken an equity study and tribes were not involved in the design of that study, nor have they been informed as that study has been pursued.

Mr. Chairman, the report of the Portland area has a lengthy section of recommendations, and I will provide copies. I believe the committee has finally obtained copies from the Bureau.

I do wish to thank you for the opportunity to present this testimony.

[Prepared statement of Mr. Sizemore appears in appendix.]

The CHAIRMAN. Thank you.

STATEMENT OF TWILA MARTIN-KEKAHBAH, CHAIRMAN, TURTLE MOUNTAIN TRIBAL COUNCIL, BELCOURT, ND

Ms. MARTIN-KEKAHBAH. Mr. Chairman, my name is Twila Martin-Kekahbah. I am the tribal chairperson of the Turtle Mountain Band of Chippewa in North Dakota.

I would like to thank you for the opportunity to provide testimony on the Indian priority system, IPS, and how it relates to self-determination.

Due to the importance of this issue, I have been accompanied by my full council and other members of our tribe. The Turtle Mountain Band of Chippewa Indians' membership includes over 25,000 enrolled members, of which over 13,000 members live on or adjacent to the reservation.

The reservation is plagued with chronic unemployment, which averages about 65 percent. The per capita income was $3,300, and ranks Rolette County as one of the lowest in the State of North Dakota. Our population is young, with 42 percent less than 16 years of age, and a median age of 19.5 years.

In 1882, President Chester Arthur, by Executive order, reduced the size of our reservation from an approximate 24- by 32-mile reservation to a mere 6- by 12-mile reservation. By this action, a tract of country estimated to contain over 9 million acres was thrown open to white settlement. As a result, our land base was severely reduced.

Turtle Mountain has 36,000 acres of tribal land, 40,000 acres of individual allotted trust acres in the immediate service area, 8,800 individual allotted trust acres in western North Dakota, and 123,372 individual allotted trust acres located within 12 different counties in the State of Montana. Seventy-six percent of our land holdings are outside of the reservation boundaries.

The tribal land is not rich, fertile land, nor do we have any oil, gas, or valuable minerals. There are tribes who have oil and gas, forestry, fishing, et cetera, while others, like ours, have little or no resources available to provide tribal revenue.

Due to our large population and housing shortage, much of our tribal land is utilized for home sites. Income from our tribal land is, therefore, nonexistent.

I applaud Mr. Sizemore in his finesse in being able to give an objective viewpoint, in a sense, of the IPS system, whereas mine is going to be more from an emotional perspective.

The Bureau of Indian Affairs in a budget allocation meeting with the Turtle Mountain Tribal Council on April 19, 1989, informed the Tribe that they must be cut $66,000. The tribal council walked out on the negotiations.

The tribal council questioned the Bureau of Indian Affairs' method of allocating moneys under the Indian priority system because we believe funding for the Turtle Mountain Band of Chippewa is grossly inequitable.

For example, in fiscal year 1989, the average IPS dollar per person for Turtle Mountain was $320, which ranked 10th out of the 12 Aberdeen area agencies. The high in the area was $1,100 per person.

Our law enforcement department and tribal court have the second, if not the highest, incidence of need per month in the Aberdeen area and ranks 12th out of 12 agencies with $47 per person in law enforcement dollars. This compares to the high of $294 in the area.

We are incensed by these proposed cuts, as they mean less money for scholarships, our local community college, fire protection, law enforcement, the tribal court system, and other programs crucial to the stability of our tribe.

For too long, the Bureau of Indian Affairs has manipulated the tribal budget by pulling programs off the system at random to cover the BIA central office's shortfalls or favored projects without consultation with affected tribes.

In addition, it is a known fact that under-funding creates a divide and conquer mentality which is not conducive in promoting tribal unity. For example, each year when the tribal council, the Bureau of Indian Affairs, and all the other programs under the Indian priority system meet to rank the programs based on need and then attempt to allocate the dollars proportionately, there has never been an adequate amount of money to justify the internal friction created by the system; however, the Bureau has repeatedly encouraged this type of reaction by its inept method of funding.

It is interesting to note that the Bureau of Indian Affairs' fiscal year 1990 budget justification to Congress lists the Bureau's budget as nearly $1.5 billion. The amount of funds available to tribes under the Indian priority system is $2.5 million. This calculates out to 17 percent of total allocated funds for the tribes to promote self-determination.

These figures speak for themselves. How can tribes exercise true self-determination when the Bureau allows this? That's 17 percent of the Bureau's overall budget.

The Indian priority system causes political and internal problems for the tribal government and program BIA personnel due to everyone trying to increase their program to meet minimum needs when, in fact, that base amount of funds are not available to meet these minimum needs.

The lack of resources and isolation from metropolitan areas also creates high unemployment and the socioeconomic problems associated with poverty for our reservation.

It is with this in mind we contend that not only the Turtle Mountain Band is not receiving equitable funding, but the entire Aberdeen area isn't, as compared to tribes in other areas.

This is certainly true when one considers the resources available to the tribes in the Aberdeen area. As stated before, Turtle Mountain does not have oil and gas, forestry, fishing, or natural resources available to them. Instead, our resource is our human potential. Therefore, how are we, the elected officials, capable of judging what is considered to be the most pressing need to our tribe when every one of the programs funded is essential to our survival.

Mr. Chairman, I would like you to bear in mind some critical questions which we have addressed to the Bureau of Indian Affairs.

First, if the BIA is requesting $1.5 billion for fiscal year 1990, why is Turtle Mountain's IPS projected allocation only $3 million?

Second, from all the research we have been conducting on the BIA's method of formula funding, we cannot make heads or tails of how they ever come up with the money allocations to the area offices and respective tribes. For example, in 1978 the tribe had 28 programs under the IPS with a budget of $4,670,000. Now, in fiscal year 1989, we have 15 programs with a total allocation of $3,097,000. How did this formula come about? Wasn't there any consideration of population increase?

Third, why is the Turtle Mountain Band of Chippewa Indians the only tribe in the country who still has their enrollment under the BIA? And why do we need to include enrollment in the IPS funding? That is a direct Bureau responsibility; therefore, it should not be included in the IPS allocation.

We request that Congress mandate the BIA to remove our tribal enrollment from IPS and appropriate sufficient funds to maintain the Turtle Mountain membership roll.

Fourth, if the BIA had a budget nationwide of $1.1 million for fiscal year 1989 for community fire services, why did the Aberdeen area receive only $53,500, and Turtle Mountain only $10,000?

Fifth, under the fiscal year 1990 budget, a $3 million increase is being allocated to social services for the Indian Child Welfare Act. Why is the Turtle Mountain Tribe not receiving any portion of this?

It is my understanding this allocation is nationwide. With the number of child abuse cases which have been investigated on our reservation, doesn't anyone in the Bureau realize we also need additional monies to address our problems.

Sixth, there are two programs which will also be discussed under my testimony. Those two programs are no longer a part of the IPS, but are now under the unbanded, non-IPS funding system. Why is it that when a program is taken off the IPS it loses dollars instead of maintaining or increasing? The programs I am referring to are the roads maintenance program and facility management.

In facility management, under another new Bureau formula funding methodology, the tribe stands to lose $380,000. If this funding methodology is utilized in the current IPS funding formula, you and I both know, Mr. Chairman, that Turtle Mountain is again getting the short end of the stick.

My question is: How did the Bureau come up with this funding formula for facility management, and how can we change it? And why does BIA mandate agency administration and executive direction programs be maintained under the IPS? They should be taken off, and the funding for their continuation be obtained elsewhere.

Mr. Chairman, the Turtle Mountain Band of Chippewas are tired of being the nice guys, sitting back in a rural, isolated area of North Dakota not making waves, trying to make do with what we get. However, we have now reached our limit of tolerance. We can no longer abide with the Bureau's base funding formula that they have determined for us.

As you listen to the following, you will understand why we are angry and are seeking your assistance in securing an equitable funding base.

The areas that we get funded under are scholarships. The present fiscal year 1990 budget is not enough to fund the average submittal of 700 applicants annually. This appropriation can only serve 250, or 36 percent, of the applicable students—64 percent of our students are not funded.

As noted earlier, we have a young population with many of our young people entering school age. Since the Turtle Mountain Band of Chippewas' resources are human, educational attainment has been our avenue in seeking self-determination. Unlike many non-Indian rural communities, we don't have the out migration or the brain drain of our educated Indians. Instead, our people, once educated, return to our reservation communities to serve the people in the fields in which they have been trained.

Adult education development is another program. This program provides precollege preparation, GED, high school equivalency, pre-GED, and literacy education. In a recent tribal survey of 600 adult residents, it was revealed that 52 percent did not have a high school diploma. We have many of our people that have not gone on to college.

Regarding the tribally controlled community college, the Turtle Mountain Community College's mission is toward becoming a self-supporting, full-service, participating community college. To serve this mission, the following objectives need to be addressed: We need to improve instructional capabilities and student service capabilities, expand the comprehensive learning center, establish an endowment, and expand our library services.

Another of the college's missions is to establish a tribal institution involved in exerting leadership within the community, providing services and preserving the cultural and social heritage of the Turtle Mountain Tribe.

To serve this mission, the following objectives need to be addressed—and, again, I say this because if you look at economic development and self-sufficiency, we need the tools and the mechanisms. I think I stated once before in testimony that institutions such as universities have political science courses that train in the area of leadership and tribal government, so we need to utilize our community colleges for that perspective, as well.

Adult vocational training is another area of the IPS program. For this year, alone—fiscal year 1989—there have been 800 contacts from people interested in vocational training. Under the IPS system as it exists, 250 actual applicants received adult vocational training.

The adult vocational training program has and will continue to be an avenue for individuals to learn a trade technical skill to compete in the job market.

In the traditional social services and tribal court areas, the tribal court—much of the court work flow involves offenses and delinquencies relating to alcohol and drugs, with alcohol-related offenses being more prevalent.

The work flow is provided into three areas: criminal, civil, and juvenile. Due to staff shortages, one-third of all our cases are not heard in court.

The tribal courts need an adult probation and parole department for monitoring individuals placed on probation. At the present time, we have no direct supervision capability. They need an investigator to investigate actions that have been filed by the prosecutor's office. We need social workers to do the necessary investigations and assessments in the juvenile cases other than abuse and neglect.

Because of the complexity of cases and Federal regulations calling for accountability, there needs to be a law library.

We need to have a public defender to represent indigent Indian people as called for under new Federal legislation. At the present time, our court is understaffed.

As for law enforcement, the law enforcement does not have the adequate number of police officers to handle the number of cases that we currently have.

Mr. Chairman, I believe that, in conclusion, what I'd like to point out is that it was my desire to have provided a bureau-wide overview of the IPS system; however, due to central office and areas' inability to comprehend the funding formula for the budget allocation of that system, we were unable to do so.

To paraphrase our area director's response when questioned on the IPS funding formula and its allocation to tribes, he responded by saying, "I don't know. I just don't know." Well, Mr. Chairman, neither do we.

[Prepared statement of Ms. Martin-Kekahbah appears in appendix.]

The CHAIRMAN. I thank you very much, Madam Chairperson. I can assure you that all of the questions you have asked will be submitted to the appropriate agencies and I will request that responses be submitted to you and to the committee. We would be very interested in their answers to your questions.

I thank both of you very much for sharing your problems with us. This makes our oversight responsibilities a bit more effective.

When we proceeded to enact these amendments, we knew that some of these amendments would cause problems, and apparently instead of alleviating some of your problems we may have added a new burden. We will be studying them very carefully.

Thank you very much.

Our final panel consists of: Mr. William P. Ragsdale, the Acting Assistant Secretary of Indian Affair, The U.S. Department of the Interior; and Dr. Everett J. Rhoades, Director of the Indian Health Service.

Mr. Secretary.

STATEMENT OF WILLIAM P. RAGSDALE, ACTING ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. RAGSDALE. Good morning, Mr. Chairman.

Mr. Chairman, thank you. We are pleased to be here this morning. I have with me some staff and representatives from the Department, but I will defer introducing them at this time.

I would ask that my statement be entered into the record, Mr. Chairman.

The CHAIRMAN. It will be included immediately following your oral presentation.

Mr. RAGSDALE. I will try not to be redundant. I believe it adequately represents our position regarding the development of the rules and the implementation of this most important legislation.

First of all, I'd like to set the record straight. The Bureau of Indian Affairs, to the very best of my knowledge, never contemplated vetoing the amendments to the Indian Self-Determination and Educational Assistance Act. I have been serving as the Deputy for Bureau Operations for the last 2 years, and neither myself nor anyone else in the Indian Bureau, including the former Assistant Secretary, to the best of my knowledge ever contemplated recommending a veto by the President.

First of all, I'd like to say about the Public Law 93-638 amendments that we are challenged and devoted to implementing this most important legislation which provides a framework for carrying out of the government-to-government and trust relationships. It is important to note, however, that much substantive law, treaty, court decisions, and so on, provide the foundation for our obligations to maintain both the trust and government-to-government funding arrangements that differ from tribe to tribe.

When I finish, I would appreciate it if the chairman would ask me the same questions he asked of the tribal chairmen with respect to tribal sovereignty, and I would be most happy to respond on the record for the committee. But first let me talk about a couple of other things.

Let me talk to the heart of the matter, and that is the important policy that the Congress of the United States and the executive entered into when this legislation was first enacted regarding the exercise of self-determination, and that is the commitment that the United States gave to the Indian tribes across the Nation to provide a unique contracting relationship between the United States and the Indian tribes in the most direct manner.

Also, under this commitment it was reaffirmed that the exercise of Indian rights, which had been assured as a matter of Federal law, including court decisions, etc., would not be affected.

The next aspect of policy and the commitment of the unique and continuing relationship of the United States of America with Indian tribes has dealt with the policy of the trust relationship and the way the United States of America would execute both the government-to-government and trust relationship.

Last week I spent 1 week in the State of Wisconsin. I was asked on a number of occasions by State officials and, in particular, by State legislators, about the U.S. Government's policy.

Essentially what I said was that I believe that, number one, treaty rights are somewhat like the Constitutional rights of all citizens of this country in that they are both solemn commitments to Indian and non-Indian people, alike, that should be carried out and you could expect this as a part of the American system.

Second, that tribal governments have fully joined in the process of being recognized as having full status in the American system of government and should be welcomed into that system under the U.S. framework.

Third, that the abrogation, abolition, or termination of rights of Indians is not on the table for serious discussion or negotiation by those responsible for keeping this public policy in both the Congress of the United States and the executive branch, to the best of my knowledge.

I know this committee has an enlightened attitude in this regard, and I know the chairman—and hopefully the committee, as well—will do all that they can to better educate the American public in this regard.

Finally, I want to emphasize that I do not consider the employees of this agency, the Bureau of Indian Affairs, in an adversary role in terms of this guarantee and commitment of the United States to further the relationships I have just talked about.

I have been in this Indian Bureau for 20 years and I am a career Indian Affairs employee. It has been my personal witness that the majority of the employees in the Indian Bureau fight for Indian rights, and we do that with a great amount of vigor, against a lot of adversaries in some instances. You don't do that and have an adversarial relationship, overall, with the clients and your beneficiaries.

I am prepared to respond to your questions, Mr. Chairman.

[Prepared statement of Mr. Ragsdale appears in appendix.]

The Chairman. Mr. Secretary, I thank you for your statement. It is very encouraging—especially your emphasis upon your policy on treaty rights. I think we coincide completely in that respect. I am also pleased to learn that you do not believe that the relationship that exists is an adversarial one, but I am certain you will have to agree that the perception in many parts of this land—Indian country and otherwise—would seem to lead one to conclude that the relationship is an adversarial one, unfortunately.

I should point out at this juncture that I do not intend to ask any questions for the record other than a couple for the IHS, which does not relate to the subject matter here, because, instead, I will be submitting questions. I don't want the exchange between us to be construed by anyone as being an exercise of an adversarial relationship.

I thank you very much, sir.

Mr. Ragsdale. Thank you, Mr. Chairman.

The Chairman. Dr. Rhoades.

STATEMENT OF DR. EVERETT J. RHOADES, DIRECTOR, IHS, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Dr. Rhoades. Thank you very much, Mr. Chairman.

My name is Everett Rhoades. I am the Director of the Indian Health Service. I am accompanied by several officials of the Indian Health Service and the Department, and with your permission, I would ask that my formal statement be entered into the record.

I would add my endorsement to the positive statements I have heard this morning, because I feel as strongly about that and Indian Health Service supports.

Second, I have often commented in my speeches around the country that although there are a number of adversaries that I encounter from time to time, due to the sincere concern that I have for the Indian people who are dying but should not be dying, this has never been reflected adversely in my relationships with tribal representatives or their other legal representatives.

Perhaps if I might just summarize the progress to date in this new phenomenon that we are involved in with the tribes that is no longer called "consultation," but, I believe, is appropriately called "participation." I would just like to review for the committee that in the 14 years since the original landmark piece of legislation was passed, a considerable amount of progress has been made toward tribal assumption of control of their own health programs.

For example, of the 127 service units in the Indian Health Service, 52 are now operated by the tribes; 7 of the 50 hospitals are operated by the tribes; 73 of 139 of our health centers are operated by the tribes; 2 of the 7 school health centers and approximately 250 smaller stations and satellite clinics are operated by the tribes. We currently have about 350 contracts for a variety of services funded at approximately $180 million. These are solely for services.

In addition to that, we have approximately $30 million in contracts for architectural and engineering construction services.

If I could just call your attention to the chart here on my right, I think I can remain seated and point out the major steps that have taken place since the amendments were signed into law on October 5, 1988.

Within a very few weeks, joint meetings were held between BIA and the Indian Health Service in several areas of the country involving a total of over 1,300 participants. The purpose for this was orientation, to ensure that the law was understood and to begin an education process for the Indian Health Service. This was followed very quickly by Indian Health Service Area Director tribal meetings in each of the 12 Indian Health Service areas which were held by December 1988. At this time I established four major work groups representing the major divisions that we believe are encompassed in the amendments to the 638 process—that is, administrative, construction, program, and resource provisions.

These four work groups were made up of approximately 66 percent Indian tribal participants selected by the tribes, representing those tribes from within each of the 12 areas. This included representatives from the National Indian Health Board and other national Indian organizations. This also involved over 400 other participants.

The purpose of these work groups was basically to begin laying out the rulemaking specifications that the law called for, as a first step in the preparation of notice of proposed rulemaking.

There were joint area meetings then held to review the work of these work groups; "joint" reflecting BIA and Indian Health Service and tribal participation taking place the first month of this year.

I established a steering committee to advise me about the mechanism of securing participation by the Indian tribes, and also the process to be followed in carrying out the intent of the law. All of our efforts have been designed to carry out the intent of the law, as we have understood it.

This group is to make recommendations to me. I made a commitment to this group that I will not make decisions of a substantive nature relating to regulations until I have reviewed them with the Steering Committee.

I might just point out, Mr. Chairman, that all of the groups that I have in the Indian Health Service, whether it is work groups or steering committee or the chairmanship of the regulation drafting, workshops have been chaired by either an Indian person, tribal person, or co-chaired between Indian Health Service and the tribes.

This led to what was called the Nashville Regulation Drafting Workshop, attended by approximately 260 participants. These participants went through the documents prepared by the working groups, line by line, with probably some of the most comprehensive and finest discussions taking place between Indian Health Service, BIA officials, and the tribes as to precisely the point in this law.

This proved to be a much more formidable undertaking than I think most of us had anticipated going into that workshop. It required that a second workshop be held, and which was attended by over 300 participants who continued developing a document which would largely reflect the point of view of the tribal participants and the Federal agencies. This document would then form the basis for continued development of these regulations. That is approximately where we are at this point.

I have been extremely impressed by the level of medical, health, clinical, and professional input into these activities by the tribes.

I might just point out, parenthetically, that both Lionel John and the representative from the Northwest have served, and continue to serve, on the steering committee for the Indian Health Service.

I believe the process has been largely successful. I think it is easy to see that it is a time-consuming process. I think your own remarks earlier this morning about the profound importance of this process suggests to me that one should approach the development of regulations quite deliberately—and I do not say this in order to delay the implementation of the regulations. There is no benefit to be derived by the Indian Health Service for delaying the implementation of these regulations.

In fact, I have a group working together in consultation with tribal participants looking at every aspect of the existing regulations and the language that is now appearing in the proposed language to see what can, in fact, be implemented in contracts prior to publication of these regulations. I believe that a modest to a moderate amount of progress can be made in this direction.

Mr. Chairman, this would serve to summarize the major point that I really wanted to bring before this committee. I am available to answer any questions you might have.

[Prepared statement of Dr. Rhoades appears in appendix.]

The **Chairman**. I thank you very much. I will be submitting several questions to which I hope you can respond. I would very much hope that you will go through the testimony of the witnesses who proceeded you and respond to their questions. I think it would be extremely helpful.

Doctor Rhoades, we all know that there is going to be a $45 million shortfall, and several Indian tribes have approached the committee expressing their concern about what will happen to health care in their reservation.

In this audience we have tribal leaders from the Pueblo of Isleta, and they have advised me that, as a result of this shortfall, their operations would have to end. Their contract health care program will be terminated at the end of June, which would mean that services such as obstetric care, dialysis, and other acute care will be terminated in their area.

The other one comes from the Navajos in the Albuquerque area—concern that with this budget shortfall it would mean that their health care program will be ending about June the 23rd.

In both cases, they consider—and I concur—that they are emergencies. I hope you will respond to them.

In the spirit of amity and comity, I would like to announce that on June 20 at 11 a.m., this committee will convene to consider the nomination of Dr. Edward Brown, who has been nominated to serve as Assistant Secretary and Director of the BIA. At that time we will have as witnesses two Senators from Arizona and possibly a Member of the House delegation. In addition, the senior leader of Dr. Brown's tribe has been invited to testify, if he so wishes. In order to accommodate all those who may wish to testify, we are inviting them to submit statements. These statements, subject to our study, will be made part of the record.

We intend, at the end of the hearing, to immediately vote upon the nomination and hopefully report it out that day, unless something should come up that we don't anticipate at this moment.

And so those of you who may be interested in submitting statements are welcome to do so, but the speaking witnesses will be the two Senators, a Member of the House, and a leader of the tribe and, obviously, the nominee, himself.

At this time I would like to call upon my very distinguished colleague, Senator Conrad.

Senator **Conrad**. Thank you, Mr. Chairman.

I will be brief, given the lateness of the hour. But there are several questions that were raised by Twila Martin-Kekahbah, the chairperson of the Turtle Mountain Band, that I think deserve a review.

I'd very much like to know, Mr. Ragsdale, if you could tell me why the IPS dollar per person for Turtle Mountain in fiscal year 1989 was $320, when the high in the area was $1,100. How is that arrived at? There seems to be some confusion in terms of what formula is used to come up with a result like that.

Mr. **Ragsdale**. Well, I agree there is some confusion. I can't speak to the dollar amounts. The fact of the matter is that we had a meeting scheduled at 11 o'clock this morning to meet with Congressman Dorgan, I believe, with some of my staff to go over their agency budget schedule. But I think an assumption that was made that we distributed the dollars at the agency level in the IPS based upon a per capita formula or something like that is just not correct. The base level of funding for each agency operation, area office operation, and so forth, is based upon some historical base that nobody can figure out.

That is one of the reasons that the resource allocation study was requested in the President's budget a couple of years ago to get someone to do an objective analysis of how the dollars are distributed against some sort of program criteria or standards and use that as a basis to start consultation with Indian tribes about perhaps changing the way monies are allocated in the Bureau through the IPS system.

Senator CONRAD. Let me be clear. I did not mean to suggest that the formula was done on some sort of per capita basis. As it has been presented to me and presented in the testimony of the Chairperson, it is very unclear what formulas are used. As you said, these base amounts seem to be lost in the mists of time. But to get a result where they get $320 a person and others $1,100 a person—and I can tell you that if you go to this reservation and the other reservations of my State, you'll find probably the most difficult economic conditions of any in the country—something is wrong. Wouldn't you agree that there is some problem?

Mr. RAGSDALE. I don't know what their analysis is. In fairness, I would have to say I'd have to look at the tribes analysis and compare it against the agency dollars and the allocation. But I think that one of my guesses, based upon hearing the chairperson testify, is that she was making a distinction about the amount of money that the tribe was currently contracting as opposed to the amount that was still in the direct operational mode there at the agency. But generally—and if the agency base has been reduced over the years in terms of total dollars, my feeling would be that that would be out of the ordinary compared against our regular Bureau base operations because the fact of the matter is that we have increased and requested an increase in the tribe agency portion of the budget this year.

Now, everything that is in the tribe agency budget that comes as a results of the IPS system—prioritization—is not the only amount of dollars that are subject to contracting and that provide direct services. The total amount of contracting last fiscal year for example, was $366 million to approximately 345 Indian tribes across the country. That is a large number over the total amount in the tribe agency bases for a lot of different reasons.

Senator CONRAD. Let me just refocus this so that it is clear where that number comes from. The number of $320 per capita is simply arrived at by taking the total IPS payments to that tribe divided by the number of members, and you get $320 dollars. If you do the same calculation for Lower Brule you get $1,100. If you do the same calculation for the Winnebago III Tribe you get $726 dollars.

Again, the question I would have is: if those numbers are correct, doesn't that disparity suggest to you that there is some problem in the funding formula?

Mr. RAGSDALE. Yes; I would suggest that we need to revise the way that we allocate the dollars. Yes, sir.

Senator **Conrad**. Mr. Chairman, it is troubling when the tribes are not able to discern how it is that payments are made.

Our Congressmen had a hearing out in the State, and it was the testimony of the tribal representatives who were present that they could not make head nor tails—I think they indicated the same thing today—about how these numbers were developed.

We ought to have a transparent system. We ought to have one where everyone can at least agree on how the numbers were arrived at, it would seem to me, if we are to have a system that is going to maintain the respect of everyone involved in the process.

Mr. Chairman, I have many other questions, and I will submit them for the record in the interest of time.

[Questions and answers appear in appendix.]

Senator **Conrad**. I appreciate very much the graciousness of the Chairman in allowing me this time.

The **Chairman**. It is always a pleasure to have you with us. The questions you have asked are very important. As you know, your constituent has submitted a whole list of questions—five of them, to be specific—and I have asked the Secretary and the Doctor to respond to them.

Doctor Rhoades, if I may, just for the record at this time, since the tribal leaders from the Isleta Pueblo are here and they may want to know what is going to happen to them, as a result of this shortfall, they fear the termination of their contract health care program by the end of June. Nationwide, I have been advised that this program will be terminated on or about the end of July, which would mean that for the last 2 months we may not have many of these body-sustaining, life-sustaining services in many of these reservations.

For example, we understand there is a hiring freeze that has been placed over 400 direct health care positions which would result in the reduction of the available number of hospital beds in all of the IHS hospitals. Can you tell us how the Indian Health Service intends to respond to this crisis?

Dr. **Rhoades**. Mr. Chairman, the information presented by the distinguished leaders from Isleta and the information from Navajo, I believe, is generally correct on the differences that we might have. I haven't seen some of their data about beds and so forth, but my expectation is that there is about a $45 million shortfall. I hope it is not greater than that. It may affect as many as 400 positions in the direct care system.

I think it is fair to say that this is the biggest threat to the integrity of the Indian Health Service's program that I have encountered since 1983 when we went through a similar exercise in the Indian Health Service. It is very serious.

I have just now received the requested spending plans from each of the areas. I am in the process of analyzing that at this moment, and will be receiving information from them on an approximately four-weekly basis.

The only choices that are available to us are the obvious choices. In the absence of any ability to deal with the question for eligibility for services, the only thing that is left for one to do is to deal with those services, themselves. The question, as it has always been, is: Who will be denied care? And what services will be denied?

In the abstract, the answers to the letter are reasonably easy; that is, given the mission of the Indian Health Service, given the Congressional directives, given what we know about what is killing Indian people—basically, I have always maintained, and I think we have been modestly successful in the general philosophy of the Indian Health Service, is that we must give our attention to the youth.

The rationing of care is not a new phenomena for the Indian Health Service, notwithstanding the fact that it is more acute this year than ever.

I will be looking at the range of services very, very carefully to see about the disturbance to the general status of health of Indian people in relationship of who gets denied care. I don't believe there are any other alternatives.

I hope that we will be able to maintain a degree of contract health care perhaps through August, but I do not know that that is the fact at this moment.

I do not conceive how it will be possible to continue that through the rest of the year.

In the meantime, we have already undertaken action such as a severe curtailment of travel, a curtailment of meetings, permitting our inventory of supplies to fall to a level that we believe is tolerable—we hope it is not intolerable—but not providing us the cushion that we would wish.

I am in great need of suggestions as to how one might accomplish this in the most equitable way, but I believe our alternatives are very, very basic and very few.

The CHAIRMAN. We have just gone through the exercise of the dire, urgent, emergency supplemental bill. And, to the best of my recollection, notwithstanding budgetary constraints, we have not called upon non-Indian Americans to forego the receipt of health services. For example, we put in over $3 billion for the Veterans' Administration to make certain that services will continue at the highest level. The same thing is true with the military hospitals, CHAMPUS, and other programs. We have provided in the supplemental incentive payments so that certain specialists can be enticed to serve.

This is the only place that we are asking, according to your statement, people to deny themselves possibly obstetric care or dialysis or surgery, and I, in this land of fairness and equity, don't think that will fly.

Are you planning to submit a supplemental request?

Dr. RHOADES. Mr. Chairman, it is my understanding that the considerations that have taken place in regard to possible supplemental had been such that we do not plan to submit a supplemental request this year.

The CHAIRMAN. Every other agency submits a supplemental. Are you afraid to do this?

Dr. RHOADES. No, sir; It is my understanding that in the formulation of the 1989 budget the allowances within the Public Health Service favored the Indian Health Service somewhat at the expense of the other agencies in the Public Health Service, and that approximately 4-percent growth was allowed.

My understanding is that it is a continued reflection of the extremely difficult choices that have to be made at the present time, given the severe budget constraints with which we live.

Ther CHAIRMAN. We are making difficult choices throughout this land, but the difficult choices have never affected the health delivery service in non-Indian sectors. This is the only place we are going to call upon people to tighten their belts and, to put it bluntly, die peacefully.

Would you submit to this committee at the earliest relevant information and statistics that we can use to formulate, on our own initiative, a supplemental request which we will submit to the Congress of the United States in behalf of the Indian country.

Dr. RHOADES. Yes, sir; we can do that almost immediately, I believe.

[Information supplied appears in appendix.]

The CHAIRMAN. I would appreciate that very much.

With that, I would like to thank both of you again. We will be submitting to you several questions, and we look forward to your responses.

[Questions and answers appear in appendix.]

The CHAIRMAN. I hope that we can begin a new era of closer collaboration and amity and destroy this perception that has been growing throughout this land that the relationship between the Congress and the Bureau of Indian Affairs, Indian Country and the Bureau of Indian Affairs, has been an adversarial one. If it is, it should be stopped; if it is not, we should clear it up.

I join you in the necessity to carry out an educational program to advise our fellow non-Indian citizens of the nature of the sovereignty of Indian people.

Thank you very much.

Dr. RHOADES. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, sir.

[Whereupon, at 12:49 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

TESTIMONY
of
W. Ron Allen, Chairman
Jamestown Klallam Tribe in Washington State
for the
P.L. 93-638 and P.L. 100-472 Regulations Development Process Hearing
on June 9, 1989
before the
Senate Select Committee on Indian Affairs

Mr. Chairman and Committee members, my name is W. Ron Allen and I'm the Chairman and Executive Director of the Jamestown Klallam Tribe. I would like to thank you for inviting me to this hearing to address this critical issue of developing the regulations for the Self-Determination and Education Assistance Amendment Act of 1988.

The spirit and intent of this Act is to provide the tribes with improved administrative authorities and mechanisms to carry the Self-Determination and Self-Sufficiency goals forward. These Amendments are also directed at improving the political/bureaucratic environment to administer the P.L. 93-638 Act consistent with the President's "Government-to-Government" Policy. In carrying out our governmental responsibilities, tribes are becoming more stable, skilled, efficient, and effective at managing their governmental affairs. The passage of P.L. 93-638 has assisted tribes in becoming proficient and skilled at managaging their own programs. Yet, over these last few years we have been extremely frustrated with the overly bureaucratic maze that we have to navigate to accomplish our objectives.

The current system and consultation process has never been conducted consistent with the "Government-to-Government" Policy. We have our unique governmental status, sovereignty, treaty rights, and jurisdictional obligations to serve our people, but the system still treats the tribes as a constituency. A tribal constituency which the bureaucracy attempts to manage as if we do not have the skills, competence, capability, education, and/or experience to manage the trust resources or other governmental functions such as education or social services without a considerable amount of oversight. This paternalistic disposition of the BIA and IHS agencies is the most objectionable aspect of the government-to-government relationship from the tribes' perspective.

We consistently find that the current bureaucratic system is deeply rooted in a subtle mentality of self-protection. Subsequently, the tribes not only find that we have to spend an excessive amount of energy making the current system work for us, but fight the bureau for the precious dollars that Congress makes available to the tribes.

The competitive reality juxtaposing over the destiny of the BIA or IHS relative to the independence and self-sufficiency of tribes that is at the root of our current dilemma. The 1988 Amendments to P.L. 93-638 provide the opportunity for the development of new regulations to implement Self-Determination. How this regulatory development process is to be logically conducted consistent with the legislative purposes is the primary theme of my testimony.

In 1988 when the tribes were working with the Senate Select Committee and the House Committee on Interior and Insular Affairs in developing the "638" Amendments, we were addressing a number of issues to improve the conditions for tribal "638" contractors. One of the key issues was our effort to change the system of "consultation" with the tribes on the development of policy, rules, and regulations to "participation". In our judgement, this means that in the context of the "Government-to-Government" relations, tribes would now negotiate as equals with the federal government the conditions of "638" contracts. The tribes commenced to work with the BIA and IHS in developing the regulations for this laws with this fundamental shift in participatory involvement inbeded in the law.

We felt that if the Bureau and IHS would sincerely work with us in developing the regulations, the tribes would be walking over the threshold of an opportunity to spend less time and effort fighting the bureaucracy and more of the resources carrying out the purpose of the Indian Self-Determination Act.

In the early phase of the development of the regulations, the BIA and IHS were attempting to draft the regulations within the schedule outlined in the law. Unfortunately, the communication was poor between the agencies and the tribes and the tribes objected to the process of developing the regulations without our direct participation. This initial bureaucratic process caused considerable alarm from the tribes because we knew that the

Bureau did not wholeheartedly support the 1988 Amendments and that the IHS appealed to the President to veto the Amendments.

The tribes sought support from this Committee and the House Committee on Interior and Insular Affairs to delay the proposed schedule for the development of the regulations to assure our substantive involvement. We were successful in that effort and with the support of IHS and the reluctant disposition of BIA, we scheduled two workshops to "jointly" (tribes & BIA/IHS) draft single set of regulations for both BIA and IHS. These workshops were viewed by the tribes as a legitimate process to address the regulatory needs and resolve conflicts and disagreements.

The tribes were extremely disappointed that the Bureau was dragging its feet in participating in the process. BIA officials kept asserting that the tribes did not fully understand how the regulations were to be developed. They also presented a position that the environment of 250 tribal leaders, lawyers, and technicians was an unfair situation to allow them to argue for their views. We acknowledged that the tribal representatives outnumbered the BIA and IHS personnel, yet we consistently pointed out that if their positions were reasonable or consistent with the law they would find support from the tribes.

From the beginning of the process, the BIA would not accept the concept of negotiating these regulations with the tribes consistent with the principle of the "Government-to-Government" relationship. They rarely came to the workshop with their positions developed and were not prepared to work out differences when such differences arose.

The two first meetings, referred to as the Regulation Drafting Workshop (RDW I & II) initiated by the Indian Health Service were conducted in Nashville and Albuquerque. At first the Bureau would not state whether or not they would acknowledge this process, but in the second meeting said that they only considered the process another form of consultation. They consistently vacillated back and forth regarding their involvement in the process and then finally settled on a position of drafting their own version of the regulations.

We want to point out to the Committee that the 250 tribal participants represented over 450 tribes, Alaska villages, and California Rancherias. The Bureau on the other hand, would take the position that because there were some tribes, villages, and rancherias not present, that we did not represent all of Indian country. This position we feel is a smoke screen to justify why they would have to draft regulations to "protect" those tribes not present. Every time we presented an argument or a position and tried to get the BIA to commit to a position, they would shift to a non-committed posture apprently to leave their options open for deliberation in their closed environment where no tribal representatives would be present to challenge their position.

The Bureau has argued that regulations cannot be developed with such a large group. We pointed out, however that the effort worked in the first two sessions and that we were only asking for one more national session to resolve the dissagreements. We then proposed that the final phases could be coordinated through the Steering Committee forum. The Steering Committee, which had been initiated by IHS, was established to provide a small workable group of Indian leaders who represented each of the 12 regions. This Committee was to negotiate the final problem or conflict areas. It was embraced by the tribes as a compromise approach to have a smaller group negotiate the final details of regulations with the departments.

Another example of our frustrating experiences with the Bureau is its unwillingness to accept the Indian leaders on the Steering Committee as the point of tribal contact in this process. The BIA has asserted various reasons for not accepting the Steering Committee; all of which boil down to the fact that the Committe was generated by IHS and not the BIA.

A key problem with the Bureau has been their attitude. During the workshop meetings they have consistently said that this issue or problem will not get past OMB. The tribes would respond by saying why can't we work these issues out with OMB? In our judgement, BIA simply did not want the tribes in a position to talk to upper level Department or OMB personnel regarding the process because of the influence of our logic and consistency with the law and the President's policy.

The development of the schedule to complete the regulation process is an another area that has reflected the Bureau's unwillingness to cooperate. It has taken us months to get the Bureau to cooperate in the development of a joint schedule; they have consistently been publishing a different schedule than IHS even after we thought that an agreement was reached in the Steering Committee.

The way the process is emerging, we feel the strategy of the Bureau is to posture their position so as to not commit to the idea of negotiating with the tribes and in the end draft their version of the regulations referred to a "Notice of Proposed Rule Making" (NPRM). This strategy would result in reverting back to the old system with the tribes in a position of attempting to modify regulations that have been developed internally by the BIA. We feel that their regulations would be implicitly aimed at the BIA retaining control over tribes.

One of the ironic observations of the process is that IHS has conducted itself more in the context of a trustee than the Bureau. There are a number of problems in IHS, but they are not as major as within the Bureau of Indian Affairs. Within the top level of the HHS there is exhibited concern about their commitment to work with the tribes in the final phases including the Clearance process.

My comments have been directed at the political and policy aspect of the process to promote a Congressional awareness of the importance of changing this process and the relationship of the Administration with the tribes in administering Indian programs. I have other more technical comments to supplement and compliment those views that you will receive today and would like the opportunity to provide them within the next week.

In conclusion, I would like to urge this Committee to assist the tribes in influencing the Administration to implement this policy consistent with the "Government-to-Government" Policy. It would be a grave disappointment if we are not able to persuade the Administration to adjust to the intent of the P.L. 100-472 and regress back to the status quo situation. A situation where the bureaucracy will prevail and the hope of Self-Determination fades into the night.

Mr. Chairman, I again thank you for this opportunity to testify before this Committee on this subject.

STATEMENT OF
S. BOBO DEAN, ESQ.,
BEFORE
THE SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON
THE INDIAN SELF-DETERMINATION ACT

June 9, 1989

My name is S. Bobo Dean. I am a partner in the law firm of Hobbs, Straus, Dean & Wilder of Washington, D.C. and Portland, Oregon. Our firm has been representing Indian tribes and tribal organizations which operate P.L. 93-638 contracts with the Bureau and Indian Health Service since the creation of the firm seven years ago. Our clients which administer programs under P.L. 93-638 include the Miccosukee Tribe of Indians of Florida, the Metlakatla Indian Community, the Oglala Sioux Tribe of the Pine Ridge Reservation, the Oglala Sioux Tribal Public Safety Commission, the Bristol Bay Area Health Corporation, the Norton Sound Health Corporation, the Maniilaq Association, and a number of other tribal school boards and other special purpose organizations. We are presently representing thirteen tribes and tribal organizations in connection with tribal participation in the development of regulations under the 1988 amendments to Public Law 93-638.

I have personally been involved in Indian law since 1965 and represented the Miccosukee Tribe in 1970 when it negotiated the first contract for tribal operation of an entire Bureau of Indian Affairs agency.

The enactment by the Congress of the Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638) (hereinafter the "Act") in 1975 was a major step toward creating a viable system of democratic self-government in the Indian country and ending the era of paternalistic federal domination of the Indian tribes.

The recent amendment to the Self-Determination Act (P.L. 100-472) was enacted in response to tribal demands -- based on the experience of thirteen years -- for the elimination of bureaucratic road blocks erected to deter Indian people from achieving the goals of the Act.

Significant reforms were made possible not only because of the substantive provisions of P.L. 100-472 but because the statute directed the Secretaries of the Interior and Health and Human Services to formulate appropriate regulations "with the active participation of Indian tribal governments and organizations." Thus Indian tribal representatives are intended to participate with federal representatives in the development of regulations to implement the self-determination reforms enacted in 1988.

This process got off to a good start. The agencies held two national regulation drafting workshops with tribal representatives in February (Nashville) and March (Albuquerque) of this year. This consultation resulted in a draft which was circulated to tribes by the government on April 3. Under P.L. 100-472, the agencies were to have regulations in place by August 5, 1989, less than two months from today. However, the agencies have requested additional times and are now targeting September 7, 1990 as the new implementation date for revised regulations, two years after enactment of P.L. 100-472. That date would not only exclude almost all of fiscal year 1990 from the impact of the reforms enacted in 1988, but would also leave the period for negotiating FY 1991 contracts (to begin October 1, 1990) uncovered.

We compliment the agencies on the extensive consultation with tribal representatives which has resulted in the April 3 draft regulations. However, we are distressed (1) that apparently little further tribal input is planned and (2) a major reason for the additional delay in reaching final regulations is apparently due to the agencies' intent to extensively re-write the April 3 draft. While (as we note below) some refinements are needed in the latest draft, we feel that the work has largely been done, and there is no reason for the entire 1990-91 contract year to pass before the principal reforms enacted by Congress in 1988 are put in place.

We are also concerned that the agencies have not yet provided guidance as to the negotiation of contracts in FY 1990 pending the issuance of regulations. Some of our clients have requested a simple contract extension for FY 1990 and been refused by the contracting officers -- apparently because they just have not been told what to do. Other area offices have advised contractors that they can extend for FY 1990 but request implementation of some provisions of the 1988 amendments. We recommend that the latter approach be implemented nationally since many tribal contractors should now be re-negotiating for the renewal of contracts which expire at the end of FY 1989.

Two distinguished tribal leaders who have testified today have participated in the consultation process, and I will defer to their comments on the policy issues raised by the federal attitude toward tribal involvement. I will direct my remarks to a number of specific legal and technical issues which have been highlighted in the consultation thus far. In some cases these issues have been resolved in the latest (April 3) draft distributed to tribes by the agencies. In others the agencies continue to frustrate the intent of P.L. 100-472.

Funding Level Appeals.
(April 3 Draft Report p. 36, hereafter "Draft.")

The major disputes which have arisen under P.L. 93-638 involve the level of funding to which tribes are entitled under the Act. Under the April 3 draft, appeal of a funding dispute falls under the declination criteria of § 102 of the Act and not the contract disputes provision. This ensures that funding does not become a threshold criterion to the award of a contract in violation of the clear intent of the 1988 Amendments. See Senate Report 100-274 at p. 24. But we understand that IHS objects to the draft language because it refers to a funding level appeal as a declination appeal. IHS is willing to provide the same hearing rights when a contract is refused on funding grounds but unwilling to describe such a refusal as a declination.

In our opinion, this is not merely a semantic dispute. The Act requires IHS to do one of two things when it receives a request for a contract for a tribe (1) to approve it or (2) to decline it and provide an appeal and a hearing. The April 3 draft reflects this clear statutory mandate. The IHS approach -- that a dispute over funding involves a third alternative -- is unacceptable even when the same appeal rights are provided by regulation. Under the IHS approach, such rights are provided by the agency as a matter of grace. In fact, the statute gives IHS no third alternative: it must approve or it must decline in accordance with the statutory declination procedure. We urge that the language in the April 3 draft be retained.

The IHS also challenges one of the five statutory methods by which funds for a self-determination contract may be reduced: namely, a directive in the statement of the managers accompanying a conference report on an appropriations act or continuing resolution (P.L. 100-472 § 106(b)(2)(B)). The IHS recommends deleting this provision from the regulations, citing President Reagan's signing statement which states that the provision is "unconstitutional, yet severable." Inconsistency between the Congress and the Executive Branch on this issue will certainly lead to confusion as to the levels of funding to which tribes are entitled under the Act. We recommend that the Committee consult with the Indian Health Service and the Senate Appropriations Committee to clarify this issue so that funding reductions on this basis will either be clearly authorized or not authorized.

The IHS also seeks to add a sixth method to the five statutory provisions. The IHS would add a "changed circumstances and factors" section which was not included in the reduction of funding section of P.L. 100-472. We are unaware of the statutory basis for this IHS regulatory proposal which would substantially increase the discretion of the agencies to reduce recurring contract funding levels without tribal consent. Section 105(c)(2) of the Act permits "changed circumstances and factors" to be taken into consideration when contracts are renegotiated, but does not authorize unilateral reductions.

We are also concerned with the status of the implementation of "calendar year contracting" mandated by section 105(d) of the amended Act. As we understand this provision, it requires that contracts in FY 1990 commence on January 1, 1990, "unless the Secretary and the Indian tribe or tribal organization agree on a different period." However, the Administration has not requested the quarter year funding necessary to implement this provision without leaving the final quarter's funding level contingent on future appropriation. The whole point of calendar year contracting was to permit the negotiation and award of contracts based on firm appropriation figures. We urge that your Committee work with the Appropriations Committee to assure either that BIA and IHS be provided with the dollars necessary to implement this provision in FY 1990 or that the Act be amended to prohibit BIA or IHS from insisting on calendar year contracting over the objection of a tribal contractor.

Contracting Process.
(Draft pp. 23-25)

Congress made clear that the "fundamental objective" of the Federal Indian self-determination policy is to increase and strengthen the ability of tribal governments to plan and administer services and programs to their members. P.L. 100-472 created "mature contracts" (contracts with an indefinite term), removed the six "threshold criteria" which the agencies had used as an obstacle to contracting, and requires that unless a contract application is declined within 60 days based on the statutory criteria, it should be approved on the 90th day. These statutory mandates are evidenced in the regulatory provisions pertaining to contract term, continuation of contracts and review/approval of contract proposals.

The IHS, however, has taken an unnecessarily restrictive interpretation of the statutory language. IHS concludes that an Indian tribe wishing mature contract status cannot opt for mature contract status for a term of years. We urge the Committee to review this matter with IHS to clarify that a tribal governing body has the discretion to select a contract term which it deems best for the needs of its members and most consistent with the purposes of the contract and that the 1988 Amendments are not meant to require an "indefinite" term for a contract qualifying as mature when a definite term (for example five years) is more appropriate based on the needs of the tribe or the purposes of the contracted program.

The Bureau suggests that the declination criteria of § 102 of the Act shall apply to the renewal of an existing contract for the same functions or programs. This is contrary to present BIA and IHS regulations. See, for example, 25 C.F.R. § 271.20; 42 C.F.R. § 36.207. The existing BIA regulations on this issue should be retained. They provide that contracts "will" be renewed when involving the same functions as already contracted and clarifying language from existing BIA guidelines ("renewal of such contracts is not at the discretion of the Secretary") should be incorporated in the regulation.

The IHS also seeks to eliminate regulatory presumptions from the draft which make it easier for an Indian tribe or tribal organization to contract under the Act. The regulatory presumptions clarify that the burden lies with the Secretary to prove that an Indian tribe cannot satisfactorily operate a P.L.

93-638 contract. These provisions in the April 3 draft should be retained. It is equally clear that failure by the Bureau or the IHS to approve a modification providing funds for a subsequent year of a multi-year contract is subject to appeal and a tribal right to a hearing just as in the case of a refusal to approve an initial contract proposal. The April 3 draft makes this clear by making declination to amend an award subject to declination appeal procedures, as well as a declination to make an award. This language should be retained.

Regulations pertaining to contract modifications should reflect that bilateral modifications do not require a resolution of the tribal governing bodies served unless such action is required by the tribal resolutions requesting the initial contract. The present draft does not recognize that a tribal resolution may limit the authority of the tribal organization which operates a program.

The IHS also wishes to weaken the statutory time frame in which to award a contract under the Act. The IHS would provide in regulations that a contract which was not declined on the 60th day is deemed approved on the 90th day "to the extent the proposal conforms to the law and regulations" and would delete language which would allow the Indian tribe to incur contract costs from the 31st day after approval of the contract. We urge that the April 3 language providing that the contract shall be deemed approved on the 90th day (or the 120th day if the tribe grants an extension) be retained.

Program Standards.
(Draft p. 48)

Another controversial issue in the regulation drafting process has been the question of program quality assurance, program standards and data requirements contained in the program management subpart of the draft. The reason for this controversy is that this section goes to the heart of the contracting debate; namely, how much authority are the Federal agencies willing to relinquish to Indian tribes and tribal organizations which contract under the Act. It is a question of who will ultimately exercise control over the lives of Indian people. The Act and P.L. 100-472 answer this question in favor of the Indian people themselves.

In the area of program quality the IHS and tribal representatives reached a compromise on the issue of tribally developed standards and data requirements. The IHS still has some reservations but has recognized the right of Indian tribes to develop their own standards which must then be reviewed and approved by the agency. The Bureau is still reviewing this provision and has yet to comment. Its representatives have suggested that for some Bureau-funded programs there must be specific mandatory program requirements. While this may be so in some instances (i.e., proper training for police officers carrying firearms) such requirements should be minimums which are clearly stated in regulations to assure fairness to all tribes and to deter the agencies from imposing detailed requirements as to program content which would inhibit innovation and the tailoring of programs to meet tribal needs.

Contract Monitoring.
(Draft p. 52)

In the area of contract monitoring and contract modification, the Bureau has yet to embrace the intent of Congress to transfer the responsibility for the planning, operation and implementation of Federal programs from the Federal agencies to the Indian people themselves. The Bureau appears reluctant to decrease the Federal contract monitoring bureaucracy which has replaced the Federal service bureaucracy. This is illustrated by the Bureau's desire for a provision giving the BIA discretion to increase contract monitoring and reporting based on "reasonable cause." The monitoring and reporting reasonably required should be specified in the regulations to prevent harassment of tribal contractors.

Property Management.
(Draft p. 87)

We support the Bureau's conclusion in the property management subpart of the draft that the agencies have the legal authority to transfer title to excess real property of the Federal government to tribal contractors. Unfortunately, however, the IHS does not share this opinion. We urge this Committee to encourage the IHS to follow the Bureau's lead in this instance. We fail to understand why the two agencies take opposite positions.

Personnel Quarters Management
(Draft pp. 89-91)

Closely related to the issue of real property management is the management of housing for employees.

One of our clients, the Bristol Bay Area Health Corporation, has objected to IHS that federal rent-setting procedures have caused unreasonably low rental rates for government quarters since the rates are pegged to the urban Anchorage market, rather than to the rural, isolated Dillingham community near the Kanakanak hospital where the quarters are located. The BBAHC Board has decided to establish reasonable rental rates based on the rents charged in the adjacent Dillingham community rather than continuing to be bound by the IHS determination under OMB Circular A-45 to charge much lower rentals based on the Anchorage market. BBAHC's desire to increase rents complies with the command of federal law and OMB Circular A-45 that rents be set at the reasonable value of the quarters and not be set so as to provide a housing subsidy. We are concerned that IHS may attempt to cancel the BBAHC contract unless the Board backs down, and we urge that this Committee contact IHS and the Office of Management and Budget in support of BBAHC on this matter.

The IHS is also unwilling to allow tribal contractors which are responsible for the operation and maintenance of government rental quarters to retain rental receipts. The IHS has insisted that such receipts must be paid over to the IHS to be placed in a central fund with no guarantee that the facility will receive operation and maintenance funding at a level equal to the rental receipts submitted or the level of funding required for adequate maintenance. In the consultation process, BIA concluded that it has legal authority to permit contractors to retain rental proceeds for use in the maintenance and repair of quarters (as both BIA and IHS had done for years). IHS -- looking at the same law -- reached the opposite conclusion. While we have heard that IHS has reconsidered this position, we have seen nothing in writing. We urge the Committee to encourage both agencies to permit such revenue to be retained and used by tribal contractors.

Procurement Standards.
(Draft p. 92)

In the procurement management subpart of the draft, the agencies allow tribal contractors to develop their own procurement procedures in lieu of procedures provided by the Secretaries. We recommend, however, that the authority to approve such procedures be delegated to Area staff, giving the contractor the right to appeal, rather than place such authority at the Secretarial level as the April 3 draft currently provides. The regulations should also make clear that procurement procedures which have already been approved by BIA or IHS need not be approved again.

Financial Management.
(Draft p. 57)

The regulations governing financial management contain some improvements but also need further modification to carry out the intent of the legislation. We urge that all tribal organizations be permitted to follow the cost principles for governments in OMB Circular A-87 (with specific exceptions to be included in the regulations) as to "allowable costs" since all are instrumentalities of their tribal governments (while tribal "non-profit organizations" should be permitted to elect to follow OMB Circular A-102, if they wish). This approach is followed in the April 3 draft, but we understand that the Bureau still would prefer simply to incorporate all applicable OMB Circulars (A-87, A-102, A-122, or 48 C.F.R. Part 31, as applicable). These general federal cost guidelines were not developed in the light of goals and provisions of P.L. 93-638 so they do not necessarily further its purposes.

The April 3 draft includes a number of selected cost principles which would apply to principles contained in Circular A-87. For example, contractors would be allowed to depreciate the cost of federally-financed facilities owned by the tribal contractor and used in a contracted program. This provision is especially important for tribes which operate health programs in facilities constructed with federal grant funds. The clause on lobbying costs is modified to permit tribal contractors to communicate with the Congress (clearly a vital tool in the achievement of tribal self-determination). A special cost principle permits professional service costs when a tribal contractor has a dispute with the federal agency up to the point that a final agency decision is made. The April 3 draft also allows "638" funds to be treated as tribal funds to meet non-federal matching requirements in other federally-funded programs. These modifications will provide specific practical assistance to tribes in their efforts to realize the goals of the Act.

In some areas the financial management guidelines still need clarification. It is obviously the intention that "cost reimbursable" and "fixed price" contracts should both remain available options. At the last Albuquerque conference, the draft was clarified to reflect that savings in a fixed price contract was not "program income" (and thus subject to restrictions on the use of such income) but merely part of the price paid to the contractor for the product or service. However, language needs to be added to the regulations to expressly authorize both the cost-reimbursable and the fixed-price method of contracting and define the general circumstances in which each may be used, as the present regulations do. See 48 C.F.R. § 380.405.

The Bureau suggests that advance payments may now be improper in the absence of Federal Acquisition Regulations which have been made inapplicable to P.L. 93-638 contracts. We cannot believe that the Congress intended to do away with such payments by exempting contracts under the Act from FAR regulations. We urge the Committee to review this matter with the Bureau. The elimination of "advance payments" would render self-determination contracting impracticable for many tribes. The intent of making FAR inapplicable to "638" contracts was to give the two Secretaries the authority to develop appropriate self-determination regulations without being bound by FAR constraints. Certainly, the agencies have the authority to provide for advance payments to contractors in these regulations.

The financial management subpart in the April 3 draft clearly states that the receipt of program income will not otherwise reduce funding amounts from the Secretary. This provision reflects existing agency policy guidelines as well as the clear intent of section 106 of the Act.

We are especially concerned that the Bureau and IHS are seeking a one-year extension of the requirement in § 102(c) of the Act which requires the Secretaries to obtain or provide general liability insurance. Ever rising insurance premiums divert scarce resources away from the service population. We urge that your Committee review carefully with the agencies the steps they have taken to comply with Section 102(c) and insist that they move ahead to provide the protection which the law requires.

The April 3 draft contains useful language clarifying the scope of FTCA coverage and spelling out procedures necessary to assure its effectiveness to replace the need for IHS contractors to purchase medical malpractice insurance. We are pleased that on May 23, 1989 the Department of Health and Human Services at last gave some guidance to IHS field offices as to how this coverage works. Guidelines need to be issued promptly to tribal contractors, however, containing the procedures outlined in the April 3 draft.

Secretary's Report to Congress and Budget Consultation.
(Draft pp. 16-20)

In enacting P.L. 100-472, Congress was keenly aware of the need to provide greater accountability by the Bureau and IHS to Congress and the Indian tribes on funding allocations and budgetary needs. Congress recognized that information on resource availability assists Indian tribes in deciding whether or not to contract under the Act. The April 3 draft pertaining to the Secretary's annual report to Congress, to Indian tribes and the provision on consultation in preparation of the Secretary's annual budget reflects this Congressional directive. Unlike the IHS, which has been receptive to the need for the agencies to be more accountable, the Bureau has concluded that such reporting requirements are too "expensive and burdensome." We disagree and trust that the Committee will insist that reporting requirements be complied with.

Contractibility and Divisibility.
(Draft p. 6)

Finally, we note that neither agency has adequately focused on the issues of contractibility and divisibility of programs under the Act. Before regulations can be finalized these issues should be addressed.

We believe that the 1988 Amendments resolve any significant issues as to contractibility and that the agencies need merely to promulgate regulations not inconsistent with the amended Act. Under section 102 the Act applies to any program or portion thereof which either Secretary is authorized to administer for the benefit of Indians by the Snyder Act (25 U.S.C. 313) and subsequent legislation. The Congress clearly intended by amending this section in 1988 to bar the agencies from exempting certain programs from tribal contracting under the Act. _See_ Senate Report No. 100-274 at pages 23-25.

In the consultation process, tribal representatives have differed on whether the regulations need contain any language on this issue. We understand that the agencies still consider that there are certain federal functions which cannot be legally transferred to tribes under the Act. We recognize that the trust responsibility and other legal constraints probably do have this effect as to certain federal functions (as distinct from programs). These functions include committing the federal government to certain actions, certain trust officer functions (approvals of leases of trust lands), technical advice in determining whether an action is binding on the United States, and maintaining accountability for federal funds, programs of property used or operated directly by the federal government. We urge that these specific functions be identified in regulations so that tribes may have the full benefit of the legislation without having to contest unjustified federal assertions of noncontractibility.

We recognize that the division of programs serving more than one tribe, when not all of the tribes being served request a contract (or multiple tribal contracts are contemplated), may be a critical issue in implementing the Act. Section 106(b)(5) of the Act provides that BIA and IHS are not required to reduce funding to non-contracting tribes in order to make funds available to another tribe under the Act. The Bureau has proposed that the declination criteria should be applied to the non-contracted portion of the program and a proposal should be declined if the non-contracted portion fails under these criteria. There is no statutory basis for this approach (except possibly as to trust resource programs). The regulations should, however, contain standards under which a program serving multiple tribes may be divided for purposes of implementing the Act. If a fair allocation of resources does not provide sufficient funds to meet declination criteria for the program to be contracted and no other resources are available, then the proposal can be declined, subject to the usual right to appeal and a hearing. We suggest that the agencies review the provisions on divisibility contained in the 1977 BIA Procedural Guidelines under the Act and circulate proposed language on divisibility for tribal comments in advance of the development of the next draft of the regulations.

These are just some of the issues presented by the regulatory process to date. We have provided for the record a detailed analysis of the April 3 draft to supplement this testimony. We thank you for the opportunity of presenting these views. I would be happy to answer any questions which the Committee may have at this time.

Attachment

ANALYSIS
OF THE APRIL 3, 1989
REGULATIONS DRAFTING WORKSHOP II
WORKING DOCUMENT
ALBUQUERQUE, NEW MEXICO

HOBBS, STRAUS, DEAN & WILDER

May 3, 1989

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May 3, 1989

MEMORANDUM

TO: Tribal Clients

FROM: Hobbs, Straus, Dean & Wilder

RE: Analysis of the April 3, 1989 Regulations Drafting Workshop II Working Document Albuquerque, New Mexico

INTRODUCTION

This memorandum provides a report on the Regulation Drafting Workshop (RDW II) held in Albuquerque, New Mexico March 21-24, 1989 (hereafter "Albuquerque Workshop"), and the April 3, 1989 draft regulations which have been circulated by the IHS to tribal organizations since the Workshop. According to IHS, the April 3 draft reflects the majority opinion at Albuquerque. In our review of this document, however, we have found a number of instances (noted below) where revisions approved by majority vote in Albuquerque are not correctly reflected.

According to the most recent schedule, the regulations will be published as final regulations on August 10, 1990, 31 weeks later than the previously scheduled date of December 29, 1989 and almost two years after enactment of P.L. 100-472. The delay is largely the result of the additional period of time required by the Federal agencies to develop an alternative draft in lieu of accepting the collaborative effort represented by the April 3 draft. Congress had contemplated that these regulations would "become effective prior to the beginning of the first fiscal year following enactment of this amendment." This schedule would have required final regulations by October 1, 1989. Final regulations cannot be expected under the revised schedule, however, until August, 1990. Consequently, new regulations will not be in place to govern 1990 contract negotiations.

The following is a review of the sections covered and the concerns expressed by both the Federal agencies and tribal representatives who attended the four day session in Albuquerque. Both the IHS and Bureau issued "concern" memoranda at the Albuquerque Workshop which highlighted their positions on various sections of the working draft document. Many of their positions are summarized and discussed in this memorandum. Not every section reviewed generated controversy, and we therefore do not analyze each section. Issues are considered in the order in which they appear in the draft, not in order of importance.

The draft regulations on construction contracts are not discussed below as they were covered in our report dated April 5, 1989.

This memorandum is designed for use in conjunction with the April 3, 1989 draft entitled "Regulations Drafting Workshop II, Working Document March 21-24, 1989, Albuquerque, New Mexico" (yellow document) and page references contained in this memorandum are to that draft. For ease of use we have included a table of contents. We recognize that this is a long memorandum, but we urge its careful review by our tribal clients in the light of the critical importance of these issues to the future of Indian self-determination. We are forwarding this memorandum to the Bureau and IHS for their information.

SUBPART A -- GENERAL

Applicability (p. 1) -- The Bureau finds the term "awards" used in this section and throughout the workshop draft to be an unacceptable substitute for "contract" or "grant" under the Indian Self-Determination and Education Assistance Act (hereinafter referred to as the "Act"). We suggest that the phrase "contracts, grants or cooperative agreements" be substituted for the term "awards." We understand, however, that the term "award" means agency action in approving a contract or agreement, so we are puzzled by the Bureau's objection.

We agree with the Bureau's comment that subsection (b) of the Applicability section relating to agreements with other agencies of the U.S. for Bureau or IHS administration of Indian programs should be moved to the Secretarial Policy section.

Effect on existing rights (p. 1) -- The Bureau contends that it would be improper in paragraph (c) of this section to assert that a tribal governing body may consent to reduced Federal services for its members. Existing regulations of the Bureau, however, do provide that: "Nothing in these regulations shall be construed as ... permitting significant reduction in services to Indian people as a result of ..." contracting under P.L. 93-638 (25 C.F.R. §271.1(c)). It has been our experience and the experience of Indian tribes and tribal organizations contracting under P.L. 93-638 that significant reductions in services have resulted from contracting under the Act, despite this regulation. The intent of requiring tribal governing body consent to a reduction in services in paragraph (c) is to provide that where such services may be reduced, the diminution of services must first be authorized by the tribal governing body. A tribal governing body may, for example, choose to revise Bureau or IHS programs so that certain services are reduced in order to reallocate resources to matters which have a higher priority for the Indian tribe. Such a step should not be imposed by the Federal agency, but could be taken with tribal consent through its authorized governing body. The reprogramming of contract funds for a "new" program requested by an Indian tribe is an example of an "authorized" reduction by an Indian tribe. Paragraph (c) recognizes the tribal government's involvement in contracting under the Act.

Secretarial policy (p. 2) -- We disagree with the Bureau that the first sentence of paragraph (c), which describes the regulations as "uniform and consistent" and states Federal intentions, is inappropriate as a statement of Secretarial policy. The matter-covered in that sentence (as well as those covered in the second sentence of section (c)) should be Secretarial policy to assure effective implementation of the Federal policy of Indian self-determination, and we believe that they are the policy of the present Secretary of the Interior. If the

Bureau's comment means that the Secretary's policy is not correctly stated by these sentences, we request an opportunity to meet with the Assistant Secretary for Indian Affairs on the matter.

The Bureau finds section (d) of Secretarial policy to be both overinclusive, insofar as contracting under the Act is an exercise of the government-to-government relationship even as to tribal organizations which are not governmental bodies, and underinclusive when pertaining to the reasons listed for Federal oversight. We suggest revising paragraph (d) to read:

> "These regulations acknowledge that contracting under the Indian Self-Determination Act is an exercise of the government-to-government relationship between the United States and Indian tribes and such other tribal organizations which are authorized by a tribal governing body(ies) to contract with the Federal government. Consistent with the promotion of Indian self-determination, Federal oversight should be kept to a minimum, in a manner consistent with the Federal trust responsibility of the United States to Indian tribes and to ensure the continuation of services to the tribes and their members."

We disagree with the Bureau as to its contention that contracting with a so-called "non-governmental tribal organization" is not a government-to-government relationship. Non-governmental tribal organizations may only contract with the Federal government upon the authorization, by resolution, of a tribal governing body. In effect, the Indian tribe has delegated tribal authority to the tribal organization which has thereby become an instrumentality of the Indian tribe. We represent a number of such organizations, including a tribal public safety commission, tribal school boards, and intertribal health organizations, all of which are tribal governmental instrumentalities.

We also object to the phrase "special relationship" suggested by the Bureau for paragraph (d) in place of the phrase "trust relationship." Line 5 of paragraph (d) had read: "... in a manner consistent with the fiduciary duty owed by the United States to Indian and Alaska Native tribes." The April 3 draft merely notes that "alternative language still under consideration." We believe the term "trust responsibility" is the appropriate phrase to use in this paragraph as it is from this legal relationship that the Secretaries' responsibilities set forth in the Act derive. "Special responsibility" is an amorphous concept which does not carry the specific legal significance which the phrase "trust responsibility" does. Indeed, the term "special" would itself require definition if the Bureau's suggestion is adopted. The IHS has argued in a pending administrative appeal, through its legal counsel, that the IHS has a "trust responsibility" with respect to Indian health:

> "The Indian Health Service program stems from a federal trust responsibility to Indian people in the area of health care. That's the basis for the entire program. And when the government contracts out a program under the Indian Self-Determination Act, that trust responsibility doesn't end, it continues. ..." Tohono O'Odham Nation v. U.S. Indian Health Service, U.S.

Department of Health and Human Services, Departmental Appeals Board, Civil Remedies Division, Docket No. C-84, pp. 27-28, Transcript of Proceedings.

We agree. This statement accurately reflects the intent of Congress in amending the Act:

> "The United States has assumed a trust responsibility to provide health care to Native Americans. The intent of the Committee is to prevent the Federal government from divesting itself, through the self-determination process, of the obligation it has to properly carry out that responsibility ... ."

S. Rep. No. 274, 100th Cong., 1st Sess. 27 (1987) (hereinafter S. Rep. No. 100-274 at ___).

The Bureau argues that the phrase "throughout the contracting process" in section (e) (p. 3) of Secretarial policy is ambiguous. We suggest that this phrase be deleted as superfluous since the remainder of the sentence clearly sets forth those instances where the Secretary shall bear the burden of proof.

Both agencies are concerned about section (f) (p. 3) which asserts that as programs are assumed by tribal organizations under the Act, Federal administrative functions must necessarily decrease with a resulting reallocation of support resources. Tribal representatives at the Albuquerque conference proposed the following replacement for paragraph (f):

> **"The Secretary recognizes that as programs are assumed by Indian tribes or tribal organizations under self-determination contracts, Federal administrative functions will change in scope and extent. When programs are contracted, the Secretary will, with the active participation of the affected Indian tribe(s) or tribal organization(s), identify any portions of Federal administrative functions that formerly supported the contracted program, shall require that self-determination contracting activities shall be accompanied by proportionate reduction in the Department's programs and related functions and staffing, with all resulting savings identified allocated to the self-determination contract to the extent that doing so will not materially diminish the resources available to other Indian tribes or tribal organizations. Other administrative support costs, such as personal property, travel, space costs and other related savings that are experienced should be furnished to the individual self-determination contractor that will be providing the required services."**

As revised, this paragraph helpfully clarifies the manner in which administrative funds to support a contracted program will be identified. Congress, in passing the legislation, noted the uniqueness of the transfer of resources and control of Federal programs to tribal contractors:

> "There is no other example of a Secretary being required to transfer resources to assist another governmental entity and simultaneously to divest itself of its own resources.
>
> * * *
>
> The Federal service bureaucracy that was supposed to be reduced as tribes assumed control of programs has been replaced by a contract monitoring bureaucracy.
>
> * * *
>
> The Committee therefore expects that the Federal contract monitoring bureaucracy that

> has replaced the Federal service bureaucracy will be greatly reduced over the next three years.
>
> * * *
>
> The purpose of restating this language is to clarify that the Secretary is not to consider any program or portion thereof to be exempt from self-determination contracts."

S. Rep. No. 100-274, at 6, 7, 19 and 23.

Clearly, Congress contemplated a reduction of Federal program functions and personnel in proportion to the contracting of such services by tribal contractors. This proposed regulation merely reflects the intent of the statute.

The Bureau reports that the Interior Solicitor's Office is concerned with the requirement of paragraph (g) (p. 4) that all provisions of the Act and the regulations shall be "interpreted liberally for the benefit of the Indians and any ambiguities therein resolved in their favor." This paragraph supplements the provisions of paragraphs (c) and (e) of this section pertaining to the recognition of the discretion and flexibility to be afforded contractors when the Federal agencies interpret the regulations. We recommend that the Bureau ask the Solicitor's Office to state with clarity those instances where it believes that ambiguities arising under the Act or regulations should not be resolved in favor of the Indian people. The Bureau's suggestion that the proposed regulations contain no ambiguities is refuted by even a cursory reading of the draft regulations.

Contract and grant authorities (p. 4) -- Under paragraph (a) of this section, the Bureau is concerned that the phrase "and subject to the requirements of these regulations" contained in the sentence "The Secretary, upon the request of any Indian tribe by tribal resolution and subject to the requirements of these regulations, shall enter into a self-determination contract ...," may be interpreted as restricting a tribe's statutory right to require the Secretary to contract. On the contrary, we believe the phrase to be a restriction upon the Secretary and his delegates and simply underscores their obligation to act in conformity with the regulations when contracting under the Act. Failure by both agencies to comply with the Secretary's regulations under the Act (as in the case of the IHS "threshold issue" policy) in the past has been the most notorious deficiency in the implementation of the Act since its passage in 1975. The regulations make quite clear under "Eligibility" (p. 6) that any "Indian tribe or tribal organization authorized by tribal resolution(s) ... is eligible to apply for a contract(s) or grant(s) ... ." We fail to see how the phrase contained in the contract and grant authorities section can be interpreted as limiting a tribe's statutory rights.

We also wish to emphasize the broad contracting authority set out in §102(a)(1)(B) of the Act. This paragraph directs the Secretary to contract programs administered under the Act of November 2, 1921 (Snyder Act) and "any Act subsequent thereto." There should be no limitation on contractibility of programs administered under any of the legislation referenced in the Act.

The Bureau suggests deleting paragraph (d) (p. 5) of this section, which provides that:

> "No program or portion of a program for which a self-determination contract request is submitted under paragraph (a), (b)(1), or (c)(1) above shall be considered exempt from such contracting."

The Bureau's justification for this is that the subject will be dealt with in the "Contractibility" section. We recommend that the section be moved to the "Contractibility" section. See further discussion on contractibility below.

Eligibility (p. 6) -- We also suggest that the "Eligibility" section be moved to SUBPART B -- PREAWARD as it is somewhat confusing following the "Contract and grant authorities" section. Provisions on eligibility of individuals for services should not be included in the section which addresses the eligibility of tribes and tribal organizations to contract.

Contractibility (p. 6) -- This issue was addressed in the "Divisibility Workgroup" at the Albuquerque Workshop. The assembled group rejected the proposed Bureau language as "unnecessarily vague" and contrary to section 102 of the Act. Some tribal representatives argued that the contractibility section be deleted from the regulations. However, in our opinion, the regulations should identify those specific functions (not programs) which cannot legally be included in a contract under the Act and make clear that all other activities are contractible as provided by Congress. We are drafting a proposed contractibility clause which we will circulate under separate cover. We urge that both agencies review this issue and identify any non-contractible functions which they consider exempt from the statutory mandate to contract set forth in §102 of the Act. This section can be based in large part on Senate Report No. 100-274 and on Bureau regulations and guidelines which have been in place for many years. See BIA Procedural Guidelines under 25 C.F.R. 271 (April 1977).

Divisibility (p. 6) -- It was agreed at Albuquerque that the definition of this term be revised as follows:

> "Divisibility means the division of a program for the purpose of contracting for a portion of a program at the service unit/agency, area or national levels where the program benefits more than one Indian tribe or tribal organization requesting such contract."

The Bureau has suggested that:

> "regulations will not be able to provide a way that all contract proposals involving the division of a budget/staff can be approved. A proposal to divide a budget/staff serving more than one tribe so that one or more but not all the tribes served by that budget/staff may have services provided by a tribal organization should be tested against the declination criteria both as to the proposed contract and as to the residual budget/staff to serve the one or more tribes who do not choose to be served by the tribal organization. If either part fails the test against the declination criteria, the proposal must be declined."

While we recognize that the remaining non-contracted portion of a program must be evaluated in terms of its viability when determining whether to contract a program, we disagree with the Bureau that the criteria with which to examine the non-contracted program are the declination criteria. At least two of the three declination criteria contained in S102(a)(2) refer to inadequacy of the "program or function to be contracted," rather than the function to be retained by the Bureau or IHS. Only the second declination criterion ("adequate protection of trust resources") could refer to both the contracted and non-contracted program or function, and it would be relevant only to programs involving trust resources.

The standard to be applied when division of a program may jeopardize the continuation of services to a non-contracting tribe is found in the paragraph following S106(b)(5) of the Act, which provides in part that:

> "[T]he Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act."

There is no statutory authority for using the declination criteria of §102(a) to review the non-contracted portion of a program.

While we agree that divisibility is a difficult issue, the Bureau has addressed this issue in the past. We therefore suggest that the 1977 BIA Guidelines on dividing programs be reexamined. These guidelines established a formula for dividing a program. We have brought these guidelines to the attention of the agencies several times during the regulatory revision process and learned to our surprise that some of the Federal representatives were not aware of them.

Indian preference (p. 6) -- We have no objections to the revision of this section, which would now permit tribal Indian preference guidelines to apply (but only to employees of a contractor which serve the particular tribe in the case of multi-tribal contracts).

Effect on other requirements (p. 7) -- We note that there now exists three versions of this section. The April 3 draft section reads:

> "These regulations govern awards under the Indian Self-Determination Act except as may be

> mutually agreed to by the Indian tribe or tribal organization and the affected Federal department or agency."

The IHS rewrite provides that:

> "These regulations are the exclusive provisions governing awards under the Indian Self-Determination Act except as otherwise provided by law, waived under authority of section ____, or as provided in these regulations."

The Bureau has proposed:

> "This part governs the award and administration of contracts and grants under the Indian Self-Determination Act and the Secretary will not impose any requirements on an Indian tribe or other tribal organization relating to such contracts and grants except as --
>
> (1) provided in this Part;
> (2) agreed to by the Indian tribe or other tribal organization; or
> (3) provided in an applicable Federal law."

The Bureau's language seems acceptable provided that the word "expressly" is inserted before the word "provided" in paragraph (3).

Amendment of regulations (p. 7) -- The Bureau asserts that the notice and participation provisions of this section combined with the requirements of §107(c) of the Act (which require the respective Secretary to present proposed regulation revisions to the House and Senate Committees on Interior and Insular Affairs, and consult with national or regional Indian organizations before publishing the proposed revision in the

Federal Register) create "a serious clearance problem" for this section. The Bureau concludes that: "It might help if there was provision for situations where quick action is needed or where the amendment is merely to reflect a change in law."

This section as drafted has made allowances for meaningful tribal input into the regulation amendment process. Section 107(c) of the Act was not amended by P.L. 100-472 or the other amendments of 1988. The language regarding consultation by the Secretaries of regional and national tribal organizations has been the law for fourteen years. Sections (a) and (b) (p. 7) of the draft regulations carry out this legislative intent by requiring that (a) the Secretaries provide not less than 90 days notice to and consult with Indian tribes and other tribal organizations concerning the need to amend; and (b) the Secretary provide tribal representatives the opportunity to assist and participate in the drafting of any proposed amendment with substantial deference being given the comments received from Indian tribes and tribal organizations.

It is hoped that, in the event there is a change in the Act, Indian tribes and tribal organizations will have been consulted and have participated in the revision of the law. In such case, it would only seem appropriate that these same entities assist in the revision of the regulations. The regulations finally adopted should be drafted with such thoughtfulness so as to avoid the need for "quick changes." Regulations "merely" to reflect changes required by an amendment to the law (like the current amendments) should not be exempt from tribal consultation and participation. In genuine emergencies, changes can be made through self-implementing legislation (or through waivers).

Furthermore, since the Bureau has indicated that it has no substantive problem with the proposition that Indian tribes and tribal organizations are recognized by the Federal Government as best suited to administer Federal Indian programs, then there should be no "clearance problems" in consulting with, and giving substantial deference to, these same entities. If the Federal Indian Self-Determination Policy is to be meaningful and effective, then the process we are now engaged in must not be a one-time event, but rather must become a precedent for future interaction between the Federal government and those entities recognized by the government as best suited to administer Federal programs for Indian people.

The Bureau's alternative to this section provides Indian tribes and tribal organizations notice and the opportunity to comment concerning proposed amendments after the agencies have drafted a proposed amendment and do not allow tribal input prior to or during the formulation of the proposed amendment. We hope that both IHS and the Bureau recognize the invaluable assistance, insight and alternative perspectives which tribal participants have brought to the present drafting process. The value of consultations prior to Federal action, rather than after it, should be self-evident.

Waivers (p. 8) -- We identify two major concerns pertaining to this section. First, the April 3 draft as well as the Bureau's revision provide that the denial by the Secretary of a tribal request for waiver of a regulation may be appealable under the contract disputes provisions of the Act and regulations. Second, the Bureau proposes that unless the Secretary declines to waive a regulation within 60 days of the receipt of such request, the waiver will be deemed approved provided that such waiver is "not contrary to law."

The denial of a waiver under this section should be subject to the declination criteria of §102 rather than the dispute process. The contract disputes procedures set no standard for consideration of a waiver request other than the terms of a contract. Unless there is a contract, this procedure would be inappropriate since "contract disputes" arise under the terms of an existing contract. We think that regulatory waivers should be granted unless the refusal can be justified by one of the three statutory declination grounds set forth in §102 of the Act.

We object to the Bureau's proposal to deem approved a waiver request not acted upon within 60 days only when not contrary to law. One would assume that a tribal organization seeking a waiver from the Secretary would not make a request if it knew that the waiver was contrary to law. A tribal entity is therefore placed in the awkward position of altering its position upon the Secretary's failure to act within 60 days and then sometime later being informed that the "waiver" was contrary to law. This arrangement is unacceptable since it exposes the tribal contractor to potential liability for default or other legal violations without notice. As a compromise, we suggest that in the event the Secretary cannot act on a waiver request within the 60 day time period, the waiver is deemed approved and will become effective in 30 days unless within that period the Secretary concludes in writing that the waiver was, in fact, contrary to law.

Definitions (p. 8) -- This section should be reviewed at the conclusion of the drafting phase so as to ensure that all terms which are used in the regulations are adequately defined. Both agencies are concerned about the definition of "mature contract" and "mature contractor." The IHS suggested that a "mature contract" cannot be for a specific term of years under §105(c)(1)(B) of the Act. It is contrary to the intent of Indian Self-Determination to require a tribe to have a mature contract for an indefinite term if it wants a mature contract for five years or if the contract work is expected to have a completion date. We recommend resolving this issue by providing that in any case in which a contractor qualifies for a "mature contract" under §(4)(h) of the Act, but requests a mature contract for a definite term, the Secretary will agree to the term requested as authorized by §105(c)(1)(A). The April 3 draft provides for mature contracts with a definite term (see page 23) in the section on contract term (b) as was requested by tribal representatives.

Under the "Protection against funding reductions" section (p. 34), we address our concerns regarding the Bureau's suggested definitions of "flow-through funds" and "pass-through funds" which are defined at p. 11.

Significant and Material audit exceptions (p. 9) -- Considerable discussion at Albuquerque was devoted to this term. The final version of the definition is as follows:

> "(1) Unresolved audit exceptions involving amounts of disallowed costs of the greater of $15,000 or five percent of the award amount to which the audit exception applies or major financial contract or grant reporting deficiencies as identified by the independent auditor.
>
> (2) A qualified opinion by the independent auditor on the fairness of the tribe's or tribal organization's financial statements representations resulting from serious departures from generally accepted accounting principles.
>
> (3) Clear findings of unresolved financial mismanagement or misappropriation of funds as

> reported in the single audit report or Special Office of Inspector General audits."

This definition should be carefully reviewed by tribal organizations and their accounting staffs to ensure that the definition adequately reflects what auditors do. The accounting firm of Ernst & Whinney, which has considerable experience in auditing tribal contractors, has suggested that this definition may create problems by using terms which are not generally accepted in the profession.

SUBPART B--PREAWARD

Self-determination award instrument (p. 12) -- This section provides that while a contract shall ordinarily be the legal instrument through which Indian tribes and tribal organizations accomplish the purposes of the Act, grants in lieu of a contract and cooperative agreements are also authorized under §9 of the Act. The Bureau indicates that this section will need further study as it is unclear what differences, if any, there will be between such agreements and "contracts."

The underscored BIA proposal which is set forth directly beneath this section of the April 3 draft (p. 12), seems somewhat clearer. We question, however, the deletion of paragraph (d) providing that:

> "An Indian tribe or tribal organization may request that funds that would otherwise be awarded as a separate grant, as provided in paragraph (a) above, be awarded and administered as a modification of an existing self-determination contract."

This section acknowledges that funds awarded as a separate grant may be awarded and administered as a modification to an existing contract. If either agency does not believe that such a combination is possible, it should explain why.

Pre-contract resolution (p. 13) -- The Albuquerque Workshop supported the inclusion of a clause which would treat the Tlingit/Haida Central Council as a tribal governing body in Alaska. The Bureau should explain why it has concluded that legal authority for this paragraph ((a)(2)(iii)) may be a problem. We understand that the Tlingit/Haida Central Council is recognized by Federal law.

Access to Federal records (p. 14) -- We agree that further review needs to be given to assure that Federal records are provided to tribal organizations in accordance with the Privacy Act, the Freedom of Information Act, and similar requirements.

The Bureau comments that the regulations make inconsistent reference to "Secretary, Area Director or field office director" throughout the regulations. The Bureau agrees, however, that the regulations should identify the individual in the Bureau who is responsible for a particular action. We favor inclusion of the underscored language which has been added following paragraph (5) (p. 15) providing that:

> "Following a request from an Indian tribe or tribal organization, the responding official shall continuously provide information consistent with the original request regarding programmatic changes as they occur to ensure that the Indian tribe or tribal organization remains apprised."

When the agency denies an Indian tribe or tribal organization access to Federal records, the April 3 draft provides for appeal, in writing, to the Secretary who shall issue a final decision within 30 days of the date of the appeal. The Bureau asks whether this section can be changed to reference the contract disputes section. The answer is "no". If such access is denied to an Indian tribe which does not have an existing contract, the contract disputes procedure is inapplicable, so an appeal procedure must be available when access to records is requested by a tribe which is not a contractor.

Secretary's annual report to Congress (p.16) -- This section has been completely rewritten. The Bureau objects to the requirement that the Secretary's report be provided to Indian tribes "for their review no less than 30 days" prior to its presentment to Congress, finding such action to be "an unjustified expense and burden in addition to the annual report to tribes." The Bureau specifically objects to the word "review" as the term suggests: "a process for changes to be proposed and considered which would only delay the report." The

Bureau notes that a delay would be unwise as the intent of the report is to provide Congress information for the appropriations process. The Bureau recommends merely providing copies of the report or deleting the provision in its entirety. We disagree and support the language recommended by the Albuquerque Workshop. Such review would help to assure that information provided by the agencies to the Congress is more accurate than it has sometimes been in the past.

The Bureau suggests that the section (a)(1) option (p. 16) may be inconsistent with §106(c)(1) of the Act. The Bureau should elaborate on its concern as section 106(c)(1) requires the Secretary to provide:

> "an accounting of the total amounts of funds provided for each program and budget activity for direct program costs and indirect costs of tribal organizations under self-determination contracts during the previous fiscal year ... ."

Congress made quite clear that:

> "These annual reports are needed by the Congress in order to provide reliable and objective data to base funding needs for indirect costs. ... This data is needed to answer questions from the Congress and from the Federal agencies on the need for indirect costs and the type of expenditures of indirect cost funds."

S. Rep. No. 100-274 at 32.

Congress also expressed the hope that such increased Secretarial reporting would facilitate communication and coordination among the Agencies, OIG and the tribes. We trust that this valuable report will be issued next March 15 as required by law.

Paragraph (a)(6) of this section (pp. 16-17) generated a great deal of disagreement. Paragraph (a)(6) requires the Secretary to report on deficiencies in direct funding for programs "as measured by the difference between needs identified by Indian tribes and tribal organizations and funding provided by the Federal government," with the Secretary providing a justification as to why unmet needs aren't funded and shall indicate funds needed to provide indirect costs to meet unmet needs.

The Bureau wishes to delete this section in its entirety, concluding that: "it goes well beyond the requirements of the Act." The IHS argues that this paragraph is inconsistent with §201 of P.L. 100-713, the Indian Health Care Amendments Act of 1988, which sets forth a method to be used to determine funding needs for health programs. IHS recommends, that the section be rewritten to provide in part that:

> "The funding needs and deficiency for health programs by the Indian Health Service will be determined using the methods specified in Section 201 of P.L. 100-713 ... ."

We note, however, that §201 of the Indian Health Care Amendments Act provides for tribal input concerning the calculation of unmet need. Section 201(b)(3)(B) of P.L. 100-713 provides that:

> "The apportionment of funds allocated to a service unit under subparagraph (A) among the health service responsibilities described in subsection (a)(4) shall be determined by the Service in consultation with the affected Indian tribes." (Emphasis added.)

Section 201(c)(4) of P.L. 100-713 also requires that:

> "Under regulations, the Secretary shall establish procedures which allow any Indian tribe to petition the Secretary for a review of any determination of the health resources deficiency level of such tribe."

Furthermore, §201(c)(2) of P.L. 100-713 defines the term "health resources deficiency" as the percentage determined by dividing:

> "the excess, if any, of --
>
> the value of the health resources that the Indian tribe needs, over
>
> the value of the health resources available to the Indian tribe, by
>
> the value of the health resources that the Indian tribe needs."

Contrary to the statements of IHS, P.L. 100-713 requires consideration of the input of Indian tribes and tribal organizations in calculating funding needs. To the extent that the April 3 draft fails to address this requirement, as well as the petition provision required in §201(c)(4) of P.L. 100-713, we recommend revision. We were startled to hear a Bureau representative at Albuquerque deny that the Bureau has any means to measure the needs of its programs. We assume that the Bureau representative misspoke.

Secretary's annual report to Indian tribes and tribal organizations (p.17) -- Section 5(e) of the Act requires that:

> "The Secretary shall report annually in writing to each tribe regarding projected and actual staffing levels, funding obligations, and expenditures for programs operated directly by the Secretary serving that tribe."

The reporting requirements in the draft regulation describe in greater detail the reporting required of the Secretaries by section 5(e) of the Act. The Bureau concludes that: "The report described [in the draft regulation] cannot be produced. Consideration should be given to costs in staff time and other expenses which will reduce funds available for programs."

IHS has rewritten this section (pp. 18-19) to require information to tribes on total obligations for direct program services, support functions, administrative costs, actual and planned staffing levels at the location of service, BIA Agency or IHS Service Unit, Area Office and Headquarters Office. The agencies must have this information available to carry out their own management responsibilities.

We remind the Bureau of the Congressional intent behind the dissemination by the Secretary of this information:

> "The Indian Reorganization Act of 1934 requires the Secretary of Interior to 'advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress'. The Bureau of Indian Affairs partially meets this requirement through its budget development system, currently called the 'Indian Priority System' and previously called 'Band Analysis', 'Zero-Based Budget,' and the 'Budget Formulation Process'. In practice, however, it has been difficult for tribes and Federal officials to correlate projected budgets with actual expenditures and resources. Often, the base figures used in Bureau budget exercises are based not on actual expenditures, but on estimates based upon the President's proposed budget. Not knowing the actual amount of resources available for the operation of programs makes it difficult for tribes that are planning to enter into self-determination contracts to determine the amount of funds that would be available for tribal operation of the program.
>
> ... Requiring Area Directors, Agency Superintendents and Service Unit Directors to report annually to tribes on staffing ceilings and filled positions, funding obligations and actual expenditures will provide a base of information which is necessary for tribes and Federal officials to jointly and cooperatively plan for the best use of those financial and staffing resources at the tribal and area levels."

S. Rep. No. 100-274 at 21, 22.

Consultation in preparation of Secretary's annual budget (p. 20) -- You should be warned that the April 3 draft at pages 20 and 21 has misidentified alternative language on the Secretary's annual budget. The critical provisions on page 20 (regular type) are an IHS description of the current budget process. Then follows the italicized provisions (a)(1)(i)-(iv), (b) approved by tribal representatives in Nashville.

The IHS has indicated that it is drafting alternative language which more closely resembles the present budget process; will consider recommendations of the IPS Task Force; and will seek to conform to 25 U.S.C. §476 which requires that:

> "The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and Congress."

We agree with the IHS that a regulation taking into consideration the above noted factors would be most helpful.

The Bureau, in addition to suggesting that this section does not belong in this Subpart, asserts that the Nashville language is contrary to statutory provisions regulating the budget process.

The Nashville language (italicized on pages 20 and 21) generally requires notice and consultation with the tribes in developing appropriation requests and does not seek to override the authority of the President to submit such requests. The Bureau's objection is only pertinent to paragraph (a)(1)(iii). The second sentence of (a)(1)(iii) requiring the Secretary to forward the proposed budget to Congress can be deleted since the tribes can pass on the information provided them to the Congress.

Initial contract request (p. 21) -- The IHS notes that there may be changes based on further deliberations concerning this section, but for the present it is content with a revision to paragraph (m) (p. 22) which would add that where a tribe or tribal organization has not previously operated a cost type contract or grant with the Federal government, such entity would have to include in its request a more detailed description of its financial, property and procurement management capabilities than would otherwise be required. We consider this IHS proposal to be consistent with the statutory declination procedure.

Term of contract (p. 23) -- The Bureau correctly notes that section 105(c)(1)(B) of the Act provides that: "A self-determination contract shall be ... for an indefinite term in the case of a mature contract." The Bureau therefore concludes from this that the option to allow an Indian tribe or other tribal organization to have a mature contract for a specific term (paragraph (b)) is prohibited by §105(c)(1)(B) and suggests that this paragraph read as follows:

> "A mature contract shall not have an expiration date. However, a tribe served under a mature contract has the right of retrocession under section _____ of this part."

While we agree that an Indian tribe or tribes which authorize a tribal organization to contract with the Federal government for the provision of services under the Act always reserves the right to retrocede a contract, we believe that it is important to add an intermediate step which a tribe may wish to take short of retrocession. Under section 4(h) of the Act, a tribal organization operating a contract in existence as of October 5, 1988, which satisfies the requirement for a mature contract, may request mature contract status provided the tribal resolution(s) which authorizes contracting under the Act does not limit the duration for which it is authorized to contract. Regulations should reflect this. We recommend that an Indian tribe, by tribal resolution, may alter the status of a contract from a mature contract, with an indefinite term, to a mature contract for a specific term or merely to a term contract and such authority should be set forth in regulations. Tribes may also wish to contract for longer than three years, but not for an indefinite term when a contracted project has a targeted completion date. It makes no sense to require an indefinite term in such cases.

As we noted in a recent flyer (Gen. Memo. No. 89-33), P.L. 100-472 requires that, beginning in FY1990, tribal contractors are to be placed on a calendar year funding basis (paragraph (c)) except when the Secretary and tribal contractor agree otherwise. The purpose of calendar year contracting is to assure definite funding commitments. Despite this statutory mandate, neither agency has seen fit to request additional appropriations in their FY1990 budget requests to cover the additional 3 months (October 1, 1989 - December 31, 1989) of the transition year. We find the Agencies' indifference to this statutory requirement, advocated by the previous Assistant Secretary-Indian Affairs, to be quite extraordinary. If funds are not provided to permit full year funding of contracts commencing on January 1, 1990, the change to calendar year contracting should clearly be postponed since its purpose (to increase certainty as to contract funding levels) would be defeated.

The Bureau suggests rewriting paragraph (d) (p. 23) of this section, which currently reads:

> "Self-determination contracts may be negotiated annually to reflect proposed changes and changes in amounts caused by changed circumstances."

The rewrite would read:

> "The amount of a self-determination contract may be renegotiated annually to reflect proposed or actual changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization."

The Bureau language more clearly expresses the intended meaning of this section.

It was proposed at Albuquerque to create a subsection (e) which would provide:

> "A new activity may be added to an existing mature contract and immediately designated a mature contract activity: provided, that the new activity is similar to an existing mature contract and does not require significantly different expertise in program and financial management."

We can foresee some difficulty with this subsection because of the vagueness of such terms as "new activity," "similar" and "significantly different expertise". Unless clarified these terms could result in disparate treatment by the respective agencies and in different Area Offices of each agency.

Continuation of contracts (p. 23) -- Both the Bureau and IES are dissatisfied with the draft language relating to the continuation of contracts for the same functions or programs. The Bureau notes that section (a) does not make reference to the declination criteria when reviewing whether to renew an expiring contract. The Bureau also notes that the "Review/approval of contract proposals" section does not indicate that this section applies to renewal of expiring contracts under the Act. These Bureau comments are curious since present Bureau regulations and guidelines also do not require review against the declination criteria when a contract is renewed for the same functions or programs. See 25 C.F.R. §271.20 and BIA Procedural Guidelines (April 1977) Chapter 10; 42 C.F.R. §36.207.

The IHS would like to substitute 42 C.F.R. §36.207 (Tribal clearances - renewal contracts) as the replacement for existing paragraph (a). This is acceptable. Section 36.207 is similar to present BIA regulation 25 C.F.R. §271.20. We recommend that the term "may" on the first line of §36.207 be changed to the term "will" to conform to the approach in the BIA regulations. We also recommend that the following sentence adopted from the 1977 BIA guidelines be inserted after the first sentence of paragraph (a): "Renewal of such contracts is not at the discretion of the Secretary." This revision should make clear that under the new regulations -- as in the past -- a tribal contractor need not justify a proposal under the declination criteria if it is for the same functions or programs already contracted. Since both agencies adopted this approach prior to the 1988 amendments, surely there is no justification for a more restricted approach under the amended law which was enacted to promote Indian Self-Determination.

Under IHS regulations at 42 C.F.R. §36.207(b), if one Indian tribe objects to renewal of a contract serving more than one Indian tribe, no contract can be made until all the tribal governing bodies have approved the request or the matter is resolved. This should not be the case. The regulations need to address the approach to be taken to the proposed renewal more specifically. Clarification of the circumstances and manner in which programs will be divided in such cases is essential to preserve the statutory rights of both approving and disapproving Indian tribes.

In addition, this section should also reflect the right of Indian tribes to "downgrade" a mature contract to a contract for a term of years. While a mature contract may be for an indefinite period, an Indian tribe should have the right, as set forth in a tribal resolution, to conduct its own review of the tribal organization, and to limit the mature contract's term if it determines that such a step is in the tribe's interest. The importance of such tribal oversight was emphasized in the legislative history of the 1988 Amendments (see S. Rep. No. 100-274 at 23).

Consolidation of contracts (p. 24) -- The IHS wishes to revise this section to reflect that: "The Secretary is not required to consolidate either contracts across agencies and departments or contracts with grants." We note, however, that this section will need to be reconciled with paragraph (d) under Self-Determination award instrument (p. 12). In light of the fact that consolidation of contracts is made discretionary by §102(a)(3) of the Act, it would be helpful if regulations set forth some criteria under which the Secretary would determine whether or not to consolidate mature contracts. This would provide a greater guarantee to contractors of uniform decision making with regard to this issue. The intent of Congress in enacting this section was to:

> "simplif[y] contract administration, including advance payment system functions, and authority for tribes to submit consolidated quarterly financial reports and a consolidated annual report, rather than having to unnecessarily duplicate reporting requirements. ... The Secretary and the tribes should propose procedures to the Congress to allow tribes to reprogram funds within consolidated contracts to better address tribal priorities."

S. Rep. No. 100-274 at 25, 26. We urge that the agencies work with tribal representatives to develop such procedures.

Review/approval of contract proposals (p. 24) -- Paragraphs (b)(i), (ii), (iii) and (iv) (p. 25) were approved at Albuquerque. These paragraphs address the "presumptions" which are to apply to a contract application of a tribal organization and the tribe(s) authorizing such a contract. The IHS proposes to delete this entire addition concluding that since the factors to which the presumptions are addressed have been removed from the statute, they should not be placed in regulations. An HHS attorney has stated that the presumptions would "skew" the declination hearing process by creating strong presumptions which the IHS would have to overcome. He would like the evidence presented at such a hearing to be reviewed without pre-existing presumptions. He argued that this would allow for a "fairer" process. However, these presumptions have been included in both BIA and IHS regulations for many years. We fail to understand how the 1988 Amendments can be used as a reason to favor the agencies by removing them.

The inclusion of these presumptions in regulations emphasize that the burden of proof is upon the Secretary to show that a contract should not be awarded. It is not accurate to state that "presumptions" were eliminated by P.L. 100-472. What that statute eliminated were certain express factors which the Secretary was directed to consider when deciding whether a contract application fell into any of the three declination criteria. Former section 102(a) of the Act (which was eliminated) provided in part that:

> "in arriving at his finding [regarding approval of a contract application], the Secretary shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) book keeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance." (See former §102(a) of the Act.)

The intent of Congress in removing this language was to strengthen tribal government control over contracting, eliminate agency obstacles to such contracting and emphasize that the burden is on the Secretary to demonstrate that an Indian tribe or tribal organization cannot overcome any one of the three statutory declination criteria. Congress made quite clear that:

> "These amendments strengthen the requirement for a tribal resolution in Section 102(a) as amended. Sections 102 and 103 in the original Act contain provisions for 'community support for the contract' which the Secretary has correctly interpreted to mean a tribal resolution.
>
> * * *
>
> While this [section] preserves and strengthens the control of tribes over the decision to contract or not to contract, it is not intended to allow Federal agencies to use the resolution process as an obstacle to requests to enter into contracts.
>
> * * *
>
> Section 201 of the Committee amendments revises current contract application procedures by eliminating some of the declination criteria including, specifically, clause (f) of sections 102(a) and 103(a) ... The burden of proof for declination is on the Secretary to clearly demonstrate that a tribe is unable to operate the proposed program or function. ...
>
> * * *
>
> The current practice of Federal agencies that impose 'threshold criteria' on a self--determination contract application is clearly inconsistent with the intent of the Indian Self-Determination Act. ...
>
> * * *
>
> As discussed above, 'threshold criteria' are not authorized by the Self-Determination Act. In addition, the practice of simply failing to enter into a contract, when the tribal organization has submitted an application for a self-determination contract, is contrary to the Act. ..."

S. Rep. No. 100-274 at 19, 22, 24 and 26.

The legislative history fully demonstrates the intent of the Congress in amending this section. The presumptions established by both agencies in the present regulations further that Congressional intent. They should, therefore, be retained. The opposition expressed by IHS counsel demonstrates once again how far IHS still has to go before fully accepting the goals of this legislation.

The Bureau notes that this section does not state that its provisions govern the renewal of an expiring term contract. We have already pointed out that the Bureau's attempt to eliminate the existing regulatory language which requires the renewal of contracts for the same functions or programs without a further declination review is unjustified in the light of the stated Congressional purposes of the 1988 amendments. Only when a contractor proposes to add programs or functions to an expiring contract should the declination procedures apply and then only to the proposed program or function to be added.

Paragraph (c) (p. 25) of this section currently provides that if the agency fails to approve the contract within 90 days without a timely declination, the contract is deemed approved on the 90th day. The IHS would qualify this language with the following proviso: "to the extent the proposal conforms to the law and regulations" (pp. 25-26).

We object to this qualifying language. A tribal organization whose contract application has not been declined within 60 days of submittal will begin to prepare to assume operation of an IHS or Bureau program or service. A tribal organization should not be forced to commit personnel and funds to a contract which has not been declined within the statutory time frame and then subsequently learn that its application, perhaps due to a technicality, does not "conform to the law and regulations." It is incumbent upon the agencies to make this threshold determination within the first 60 days of the contract review as mandated by §102 of the Act. "The Committee amendment directs both secretaries to approve contract proposals within ninety days unless the Secretary provides a basis, as provided in the Act, for declining a contract." S. Rep. No. 100-274 at 24. This statement needs no elaboration. The IHS proposal lays the groundwork for agency abuse of the statutory time frame. When this was brought to the attention of the agencies at Albuquerque, they agreed to examine this proviso more closely. Nevertheless, the proviso remains in the April 3 draft.

In paragraph (d) (p. 26) of this section, the IHS proposes to delete language which would have allowed a contractor who has not been awarded its approved contract to incur contract costs after the 31st day since the date of contract approval. No reason is given. This provision could provide a meaningful remedy against agency delay after a proposal has been approved.

In addition, the Albuquerque conference agreed to add a new subsection (f) (p. 26) which provides: "A contract proposal involving divisibility shall not be declined on that basis." We understand that this clause is intended to address, in part, the problem created when some tribes served by a program wish to contract and some do not. As discussed below, we feel that the statutory rights of Indian tribes under the Act require a viable procedure in the regulations for addressing the issue of divisibility.

Amount of funding (p.26) -- IHS suggests revising paragraphs (b)(3) (p. 27) and (b)(3)(ii)(E) (p. 28) of this section to read:

> "Contract support functions are those functions that do not duplicate program services [and] activities which are funded in paragraph (b)(1) above and are allowable under the cost principles contained in ______ . These functions may be generally classified as: ..."
>
> "(ii) Those functions the agency performs on behalf of the program. Examples may include but are not limited to:
>
> "(E) Executive functions of the governing body that are directly attributable to the direction or management of the contracted program."

In the previous draft, paragraph (E) had read:

> "Reasonable functions of the governing body related to support of the program."

The revised appeal procedures applicable to situations where the Indian tribe or tribal organization and the Secretary cannot agree on the amount of funds to be provided under a proposed contract make clear that declination requirements apply to a dispute over funding just as much as to other disputes involving the approval of proposals. This language is discussed below. Clause (e) on page 30 cross references the declination appeals section to underscore this point.

Paragraph (g) of this section (p.30) implements §106(g) of the Act requiring the Secretary to add indirect cost funding to the direct cost base. With regard to this section, the IHS asks whether direct and indirect costs lose their identity in subsequent years. We believe the answer to be no. Section 106(g) of the Act clearly states that:

> "The Secretary shall add the indirect cost funding amount awarded for a self-determination contract to the amount awarded for direct program funding for the first year and, subject to adjustments in the amount of direct program costs for the contract, for each subsequent year that the program remains continuously under contract."

Congress contemplated keeping these costs separate in subsequent years, noting that:

> "Section 106(g) is intended to require the Secretary to provide indirect costs for each contract year in addition to the program funding which would have been available to the Secretary to operate a contracted program and to prohibit the practice which requires tribal contractors to absorb all or part of such indirect costs within

> the program level of funding, thus reducing the amount available to provide services to Indians as a direct consequence of contracting. The combined amount of direct and indirect costs shall then be available for each subsequent year that the program remains continuously under contract. ... It is the Committee's hope that the Department of the Interior Office of Inspector General, the Bureau of Indian Affairs and the Indian Health Service will coordinate their efforts with the tribes to develop the most cost effective method of distributing indirect cost funds. The Committee amendment will insure that, whatever method is used, the tribal contractor will realize the full amount of direct program costs and indirect costs to which the contractor is entitled. Furthermore, the Committee amendment is intended to insure that the funds needed are continuously available, unless the Congress reduces such funds by appropriations actions."

S. Rep. No. 100-274 at 33, 34.

It should be noted that the intent of Congress is to prohibit requiring contractors to absorb such indirect costs from program funds. A tribal contractor may utilize funds to which it is entitled as indirect costs for program purposes at its election should they not be needed to reimburse indirect costs. In that sense, the funds do lose their identity once they are collected by the contractor. The identity of the contractor's entitlement to program funds and to indirect costs established in accordance with the procedures provided for by the regulations would nevertheless be preserved.

It should be remembered, however, that tribal contractors negotiate their indirect cost rate with the cognizant agency. This rate will vary from year to year as will the base funding for the contract. As a result, it would be difficult to foresee these funds "losing their identity" in subsequent years.

Paragraph (h) on page 30 states that this section is effective for all self-determination contracts "in existence" when the regulations are published and "as shall be entered into hereafter." We question whether the funding provisions of an unexpired contract entered into prior to the publication of the regulations can be unilaterally changed by publication of the regulations without the consent of the tribal contractor. However, the requirements of §106 of the Act apply to all contracts entered into after the date of the Act in the sense that a tribal contractor is entitled to insist that its contract amount be determined in the manner required by law. While we are researching this issue and will advise you of our conclusions, at present we recommend that paragraph (h) read:

> "The provisions of this section shall apply to contracts entered into after the effective date of these regulations and to any contract in existence on the effective date thereof when requested by the contractor."

Availability of appropriations (p. 30) -- In commentary on paragraph (c)(2) ("Appropriated funding available for support functions consists of:") of this section, the IHS states that two fundamental policy questions will have to be resolved before the section is finalized; namely, (1) "divisibility of both program services and support functions whether performed by

Federal government or tribal consortia," and (2) "Contractibility of functions that are unique to the Federal government (e.g., appointment of Federal staff, account for Federal funds, approval of contracts, and other functions of the Executive branch that are not directly supporting contractible programs.)"

Paragraph (f) (p. 32) provides that contracts will be increased as specified by the Congress, or if not specified, in "using any formally adopted priority system including RAM, Indian Priority System, Indian Health Care Improvement Fund, or other priority system developed by the Agency with tribal participation." The issue of equitable distribution of Bureau and IHS resources is complex and requires further study. The key to the acceptability of this language is the extent to which tribal participation in a funding allocation system is genuine and the result reflects a comprehensive tribal consensus.

Increases to contracts (p. 33) -- In paragraph (d)(2)(ii) we suggest substituting the word "appropriation" for the word "contract" as the agencies request appropriations from Congress, not contracts. In paragraph (d)(3) (pp. 33-34), the IHS suggests adding the words "unanticipated savings." We would clarify this to read "unanticipated savings by the agencies," so as not to confuse this with "carryover savings" which represent savings by tribal contractors.

Protection against funding reductions (p.34) -- IHS points out that the President's signing statement accompanying P.L. 100-472, concluded that the provision in the Act (§106(b)(2)(B)), which gives statements in a conference report the force of law, is unconstitutional, although severable from the remainder of the Act. From this fact, the IHS concludes that the phrase in paragraph (b)(1) "or related Congressional report" should be deleted. To the extent that paragraph (b)(1) does not parallel the statutory directive in §106(b)(2)(B), which provides that the amount of funds provided under a P.L. 93-638 contract shall not be reduced by the Secretary except pursuant to "a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution," it should be revised. Funding reductions should not be authorized in the regulations unless they are mandated by the Act.

As to paragraph (b)(2) of this section (p. 34), the IHS states that while this section "strictly follows" §106(b)(2)(B) of the Act, it too may be objectionable. We question the appropriateness of IHS's recommendation concerning this section. We would remind the IHS that former President Reagan, notwithstanding his reservations about §106(b)(2)(B), signed P.L. 100-472 giving every provision of that Act the force and effect of law. Paragraph (b)(2) of the proposed draft regulation simply implements §106(b)(2) of the Act.

The Constitution reserves to the judiciary the power to render an Act of Congress unconstitutional. The Executive Branch does not make this determination nor are we aware of any judicial challenge by the Executive Branch concerning this matter. Until such time as a court of competent jurisdiction rules against the constitutionality of this provision, it remains the obligation of a Federal agency to carry out the provisions of the statute. We further point out that the effect of the proposed deletion would be to leave the agencies without authority to reduce a contract even when directed to do so in conference report language.

Since Congress may establish its intent either through an Appropriation Act or in conference report language of the managers, we suggest that paragraphs (b)(1) and (b)(2) (p. 34) be revised to read:

> "(1) A reduction in the amount of the agency's appropriation for the program or function to be contracted as compared to the previous appropriation for that program or function. Unless the Appropriation Act or conference report ~~related congressional report~~ provides specific directions, any such reduction shall be shared proportionately among self-determination contracts and federally operated programs or, alternatively, in amounts mutually agreeable between the Indian tribe or tribal organization and the Secretary.
>
> (2) A directive in the statement of the managers contained in ~~accompanying~~ a conference report on an appropriation act or continuing resolution. The contract(s) will be reduced by amounts specified in the congressional directive, or if the directive is not contract-specific, then contract funding will be reduced proportionately with federally operated programs."

We revised paragraph (b)(2) to reflect that a directive of the managers is contained in the conference report which accompanies an appropriations act or continuing resolution. Such directives are not separate from the conference report.

Paragraph (4) (p. 35) of this section pertains to reductions in "pass-through funds" needed under a P.L. 93-638 contract. Paragraph (4) implements §106(b)(2)(D) of the Act. The alternative language proposed by the Bureau would result in the following meaningless language:

> "The amount of funds for a self-determination contract may be reduced only if one or more of the following conditions exist:
>
> (4) A decrease in the amount of direct funds in a contract eligible for application of an indirect cost rate."

In other words, the Bureau is stating that contract funding may be reduced when contract funds are reduced. In addition, not all contracts have indirect cost rates. In some instances the contract is awarded a lump sum for indirect cost. The intent of the statutory language is to permit a reduction in a contract when funding provided by another agency (*i.e.*, Department of Education) is reduced.

The agencies propose a definition of "flow through", meaning funds appropriated to another agency and then transferred to the Secretary for the operation of a program or service, which covers "pass through" funding as used in the Act. (See p.

11.) We noted in our General Memorandum No. 88-70 of October 18, 1988, that while the term "pass through" was not defined, the 1987 House Committee Report accompanying the House version of the Act made clear that the term "pass through" referred to monies appropriated to another Federal agency which are then passed through to the Bureau or the IHS for use in Indian programs. Congress clearly meant by "pass through" what the agencies proposed to define as "flow through." Clarification needs to be achieved by a technical amendment to the Act rather than adding to the confusion through the use of terms in the regulations different from the way they are used in the Act.

In regard to paragraph (b)(6) (p. 35), while the Act sets forth only five reasons to justify a reduction in funding, the IHS wishes to add a sixth "changed circumstances" reason which is reflective of §105(c)(2) of the Act which provides:

> "The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization."

This clause is out of place. This language has already been included on page 33 in the section covering contract increases. Its inclusion in the regulation implementing the statutory ban on decreases is inappropriate.

We should note that this section allows the exclusion of funds from a contract amount to compensate Federal employees assigned to the contractor but requires the consent of the contractor to the amount of any such deduction (with unexpended funds being returned to the contractor).

Appeals process (p. 36) -- In paragraph (a)(1) the renewal of contracts and the determination of the amounts of contracts (either new awards or renewals) under §106 of the Act are subject to the same appeal procedures as declination appeals. However, on appeal the amount of an award is reviewed against the requirements of §106 of the Act, not against the declination criteria of §102. Regulatory language in contract renewals should carefully reflect two principles: (1) to the extent that a renewal is requested for the same functions or programs already under contract and there is no dispute as to funding level, then the agency (as under the existing regulations, see 25 C.F.R. §271.20, BIA Procedural Guidelines (April 1977) and 42 C.F.R. §36.207) does not review the renewal proposal against the declination criteria; and (2) if there is a funding dispute, the contractor has the same appeal rights as it would have if the request were rejected on any other ground. These provisions, which were cleared by the Bureau and IHS in Albuquerque, should resolve the long dispute with IHS over funding as a "threshold issue" which is not subject to the appeals process.

Under paragraph (b) (p. 39) an informal conference may be held within 30 days from the filing date at the contract site when feasible.

Under paragraph (c) (p. 39), appeals from an Area Director's decision or the decision of the informal conference may be made to the Interior Board of Indian Appeals, whether the appeal is from the Bureau or from IHS. If the Board concludes that the appeal concerns declination or non-emergency reassumption issues, it will refer the case to the Hearings Division of the Office of Hearings and Appeals (Interior) where the hearing will be conducted by an Administrative Law Judge within 30 days of the referral or as otherwise agreed upon. The Secretary's answer must be filed at least 15 days before the hearing. The hearing must also proceed in accordance with 5 U.S.C. §554 which governs "on the record" adjudications.

Paragraph (e)(4) (p. 41) provides that the burden of proof is on the Secretary in a declination appeal (as provided in the existing BIA and IHS regulations).

We question whether having all declination appeals go to by the Department of the Interior will prove effective. As long as appeals are heard in accordance with the Administrative Procedure Act, we do not object to appeals from IHS going to the HHS. Appeals involving health issues may require a special expertise which justifies this approach.

Contents of award document (p. 42) -- We note in paragraph (b) (p. 43) that this section provides that the regulations and the tribal contractor's approved proposal are incorporated by reference into the "award." Furthermore, this paragraph implements §110(b) of the Act by adding the final sentence which provides that: "The Federal Government may not impose additional terms and conditions without approval of the Indian tribe or tribal organization."

Status of contracts in effect on effective date of regulations (p. 43) -- This clause is unchanged from Nashville, but IHS recommends further study on conversion of "mature" contracts to the new contract format. We suggest that the phrase "existing contracts considered as mature" in paragraph (b)(1) (p. 44) should be clarified to make clear that this reference is to contractors which have requested "mature" status and have been determined by the Federal agency to be qualified for that status. Indian tribes may wish to consider whether a dispute over compliance with the new requirements should be treated as a "contract dispute" or a "declination appeal."

Designation as a mature contract (p. 44) -- An additional sentence was added to this section which provides: "Subsequent funding of such contracts shall not be subject to declination." Our records do not indicate that this addition was approved by the Albuquerque Workshop. Subsequent annual funding of contracts is and must be subject to the declination appeal procedure when there is a dispute over the funding level of the contract. The added sentence suggests otherwise. A contractor is certainly not intended to forfeit the right to appeal a funding decision because it has achieved status as a "mature contractor." As explained above under "Appeals Process," the amount of annual funding for mature contracts is determined under the provisions of §106 of the Act, subject to the tribal right to an appeal.

All participants at the conference were uncertain as to the process by which a tribal organization could request mature contract status. This will depend upon the pre-contract authority evidenced in the tribal resolution(s). We would also note here that the definition of "mature contract" contained in the Act is silent as to whether mature contract status may be extended to grants in lieu of contracts and cooperative agreements under the Act.

Commencement of services (p. 45) -- We agree that where the Secretary has failed to comply with the applicable deadlines set forth in these regulations a tribe or tribal organization shall be able to incur preaward costs during the period prior to commencement date. The addition by IHS to this section allows for such authorized preaward costs, but only when authorized by the Secretary. At page 26 the April 3 draft regulations would provide automatic reimbursement after a 30 day delay.

SUBPART C -- PROGRAM MANAGEMENT

Program Quality Assurance Standards and Data Reporting (p. 48) -- This was perhaps the most controversial area discussed in Albuquerque. After an impasse between the agencies and tribal representatives, IHS and tribal representatives developed a revision of the Nashville version which is included in the April 3 draft. The Bureau questions some aspects of this language and has it under review. While we support the language approved at the Nashville Workshop, the Albuquerque revision is acceptable in certain essential areas:

(1) The right of tribes to negotiate standards and data requirements as alternatives to BIA and IHS guidelines, including "equivalent tribally accepted standards," is recognized.

(2) JCAHO and HCFA standards are acceptable to IHS "without further specification in the contract proposal."

(3) Reporting is limited to data required for specific purposes cited in the proposed regulations in paragraph (e) (p. 49) and must be justified as essential.

(4) Under "Process for establishing contractor standards and data requirements," once an award is made, additional standards and data requirements may not be imposed "except

through negotiation between the Department and the contractor" (paragraph (e) (p. 50)). We recommend that the phrase "except with the approval of the contractor" in paragraph (e) be substituted in place of the phrase "except through negotiation between the Department and the contractor," to avoid any misunderstanding of the meaning of the term "negotiation."

We also recommend that language be added which reflects the need for sufficient funding to permit required standards to be achieved. This was included in the Nashville draft and should be reinstated. In general, the Nashville draft better reflects the wishes of tribal representatives and the purposes of the 1988 Amendment.

Congress did not wish to see internal agency requirements imposed upon tribal contractors. While we recognize that tribal contractors are carrying out Federal programs, they are not Federal agencies for all purposes:

> "The Committee amendment also prevents the Bureau of Indian Affairs from requiring tribal contractors to utilize financial, procurement, travel and personnel systems or procedures utilized by the Federal Government for the internal operation of Federal agencies.
>
> * * *
>
> It should be clear from the intent of the Indian Self-Determination Act that the administrative procedures and methods used by Federal agencies for their own internal operations should not be imposed on tribal contractors. Nor should the Secretary impose requirements on tribal contractors that are more stringent than those im-

> posed on Federal agencies or on private contractors."

S. Rep. No. 100-274 at 20.

With respect to reports the legislative history is even more explicit:

> "The Committee recognizes that there may be legitimate needs for information for statistical, research or evaluation purposes, and that these needs may be negotiated with tribes. Tribes may or may not consent to reports for such purposes. Unfortunately, for the past decade, there have been too many instances of reports being imposed on tribes by Federal officials in an arbitrary and capricious manner. Too often, tribal officials have been threatened with termination of contract funds if they refuse to submit computer forms, statistical reports, 'special' reports, lists of serial numbers of law enforcement vehicles operated by the tribe, certificates of Indian blood for students served by tribal education programs, and other such reports. While such information may be important and useful, there must be agreement between the Federal agency and the tribal contractor on the purposes of such reports. Tribal compliance or noncompliance with such reporting requirements is not to be used by the Federal agencies as the basis for withholding or terminating contract funds."

S. Rep. No. 100-274 at 21.

In Albuquerque, tribal representatives argued that new or additional quality standards need to be implemented over a reasonable period of time so as to afford tribal contractors the time needed to evaluate whether they will need additional staff, Federal funding, training, updating of data processing and technical assistance in order to comply with such standards. It was emphasized that implementation of meaningful program standards must be an ongoing and dynamic process which must remain flexible as standards change and evolve. Federal funding must be commensurate with tribal efforts to upgrade the capacity and capability of tribal contractors to implement changing standards.

Some tribal representatives object to the inclusion of program standards in regulations. These individuals argue that program standards really go to the issue of control and that standards will require approval and monitoring by the agencies to ensure compliance. This necessarily creates a tension between the need for Federal oversight versus the intent of the Act to promote Indian self-determination. Finally, those who oppose regulatory standards emphasize that standards involve cost, which the agencies and Congress have all too often in the past been unwilling to support, resulting in tribal contractors being required to meet Federally imposed standards without the financial means to attain and maintain the level of program quality required.

We recommend that the minimum program standards to be required by the Bureau and IHS (unless a regulatory waiver is granted) should be included in the regulations specifically to avoid the insistence by the Bureau and IHS staff on detailed requirements in contract scopes of work. A hospital contractor which agrees to comply with JCAHO standards need include no other standards in its contracts. The Bureau can include minimum standards for trust, law enforcement or other sensitive programs in the regulations. See, for example, 25 C.F.R. Part 11 relating to law enforcement, and 25 C.F.R. §271.31-271.34, relating to additional requirements when trust resources are involved. Thus, reasonable requirements should be fixed in regulations and not left to negotiations so that contractors with less leverage and influence may be subject to more burdensome requirements by Bureau or IHS staff than more "powerful" contractors accept.

Contract modifications (p. 50) -- We suggest the following revisions in paragraph (a). After the phrase "Bilateral modifications do not require a resolution" add the phrase "of the tribal governing body(ies) served unless required by the tribal resolution(s) requesting the contract." Indian tribes have the right to require tribal governing body approval of contract amendments. The existing language is also ambiguous in suggesting that a resolution of the contractor's governing board may not be required. A bilateral modification must be signed by an official of the contractor duly authorized to execute the contract.

The IHS wishes to revise the last sentence in paragraph (a) (p. 50) to read: "Program changes which do not significantly affect the level or nature of services being provided may also be made by Indian tribes or tribal organizations." We agree with this change, but would add at the end of this sentence: "without such agency approval or contract modification" to make the intent absolutely clear.

In paragraph (b) (p. 50) we recommend the following:

In paragraph (b)(1) substitute the word "authorized" for the word "excluded" in line 3.

In paragraphs (b)(2) and (3) we recommend the following:

Strike paragraphs (2) and (3) and insert in lieu thereof:

> "(2) Subject to the exercise by an Indian tribe or tribal organization of its authority under § 110(b) of the Act to approve unilateral changes in a self-determination contract, modifications which only change mailing addresses or modifications which add funds to contracts, pursuant to budgets previously agreed to by the Indian tribe or tribal organization and the contracting agency, may be made unilaterally."
>
> "3) The approprate federal agency shall not combine any other amendments to a contract in a modification which adds funds to a contract."

As we noted in our February 16, 1989 letter to Acting Assistant Secretary, Indian Affairs, and Director, Indian Health Service:

> "The proposed draft provision allows unilateral modifications which only correct 'typographical errors', 'change mailing addresses', or

> make 'other nonsubstantive changes which do not modify the contractual obligations of the parties.' While this appears to be a rather insignificant provision, whether a change is nonsubstantive is a subjective question. Minor modifications can alter a party's rights under a contract. The revision we propose allows unilateral modifications in the form of change of address and the adding of funding to a contract. We also make clear in (3) that a funding modification cannot include other changes since such changes require bilateral agreement. In the past the agencies have sometimes coerced agreement by including substantive changes when needed funds are awarded."

For clarity we recommend a cross reference in this section to the appeals procedure to make explicit the tribal right to appeal a declination to approve an amendment to an award. We propose adding the following sentence at the end o paragraph (b)(1):

> "When an Indian tribe or tribal organization requests a change, and the Federal government does not agree with the change within thirty days of the written request, the request shall be considered denied and the Indian tribe or tribal organization may appeal as provided in section _____."

Paragraph (4) (p. 51) should be revised to read:

> "(4) When a self-determination contract is with a tribal organization which is not a tribal governing body and serves more than one Indian tribe and one Indian tribe withdraws its tribal resolution of support, the program description and funding amounts shall be negotiated under these regulations. Following such negotiations, the tribal organization shall submit a contract modification for the remaining portion of the contract. The contract status of the modified contract shall not be altered unless such alteration of contract status is warranted under section _____."

The section reference is to "Divisibility". This situation may present serious problems with respect to the "divisibility" of the program and the rights of the contracting and non-contracting tribal organizations. We discuss this problem further at pages 13-15 of this Memorandum.

Personnel (p. 51) -- The IHS notes that additional provisions relating to the assignment of Federal employees to contractors and other personnel issues may be added at a later date. We are somewhat dismayed by the lack of attention given by the Agencies to this section. Congress has made it easier for Federal employees to transfer to tribal employment while retaining civil service benefits. IPA transfers are made easier and federal benefits are still available. Employees under excepted service may be reclassified as competitive service personnel as well as allowing displaced federal employees to compete for government-wide jobs (See §104 of the Act; S. Rep. No. 100-274 at 29).

This section should be of great importance to the Agencies as it concerns their own employees. A greater focus on the provisions provided in §104 (especially (k)-(m)) is of utmost importance to both Federal employees and tribal contractors who may wish to hire such personnel for their invaluable experience and knowledge of the contracting process. The Agencies should recognize, and implement in regulations, the statutory mandate of facilitating the "orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services" (see §3(b) of the Act). Provisions relating to the funding of Federal personnel assigned to contractors are noted at page 51 of this Memorandum.

Monitoring (p. 52) -- The proposed language limits Federal monitoring to a manner consistent with Congressional intentions. See S. Rep. No. 100-274 at 19. The Bureau wishes to replace this section with the following:

> "Indian tribes and tribal organizations are responsible for managing the day-to-day operations of the contract activities and to assure compliance with applicable contract requirements and achievement of program goals as established by the contract.
>
> The Secretary has a responsibility to monitor contracts to ensure contract compliance. In-depth reviews of contracted programs, other than reviews which are programmatic requirements, will not occur more often than once a year, unless the Secretary has reasonable cause to believe that satisfactory services may not be provided or Federal resources may not be properly managed. Periodical reviews of contracted programs or parts thereof are a normal ongoing process of the Secretary in ensuring contract compliance in the delivery of services."

The Bureau's language contains a number of broad terms which are subject to varying interpretations. Such terms as "in-depth reviews" and "reasonable cause" are undefined and can result in disparate treatment. As noted earlier, the Bureau also proposes to insert this language in the Quality Assurance provisions of program standards. The Bureau's proposal (especially the last sentence) is in conflict with the manifest intent of the statute.

Retrocession (p. 53) -- In paragraph (c) we suggest language which would permit the provision of technical assistance even after a tribal contractor chooses to retrocede a contract. Such assistance may lead to a tribal decision to continue to operate the program. The existing draft provides for technical assistance only up to the decision to retrocede.

We are concerned that the revision to paragraph (d) of this section goes beyond the authority of §105(e) of the Act which provides that: "Whenever an Indian tribe requests retrocession of the appropriate Secretary for any contract entered into pursuant to this Act, such retrocession shall become effective one year from the date of the request by the Indian tribe or at such date as may be mutually agreed by the Secretary and the Indian tribe." We find no authority for tribal organizations to unilaterally retrocede a contract.

However, the regulations could provide that: "A tribal organization may exercise a right to retrocede a contract previously delegated to it by a tribal governing body(ies)." While a tribal organization and the Federal agency may agree to cancel the contract by bilateral modification, such a termination should not be referred to as a "retrocession" to avoid confusion.

In paragraph (i) (p. 55) of this section the IHS wishes to restore the following language which had been stricken in the Albuquerque draft: "The Federal Government shall endeavor to provide to the Indian tribe(s) and Indians served by a retroceded contract not less than the same quantity and quality of service it would have provided if there had been no contract." The IHS wishes to restore an identical sentence to paragraph (e) of the Reassumption of programs section (p.56). We object to any unilateral reduction in the standard to be met by the Federal government in retrocession cases. Since the agencies convinced Congress to let them have one year notice of retrocession (instead of 120 days) they should be able to maintain the program level.

Note that the IHS is proposing to provide the same level of services as if there had been no contract, rather than providing the same level of services under the retroceded award. A contract to be retroceded which has been in existence for a number of years may provide services and programs which go well beyond the level of services provided to the Indian community prior to the contract. Upon retrocession by a tribe or tribal organization, the appropriate agency should provide the level of services and programs to the Indian community which the contract was authorized to provide immediately prior to retrocession rather than at the program level which existed prior to the contract. We therefore object to this IHS proposal.

Reassumption of programs (p. 55) -- IHS has raised the issue of what course of action should be available to the Federal government when a contractor fails to comply with its own standards as expressed in the contract document. The Act only contemplates rescission of a contract for the reasons set forth in §109 of the Act and does permit cancellation for contract deficiencies which do not satisfy those reasons. The language included in the April 3 draft should stay as it is since it conforms to the requirements of the Act.

In paragraph (c) of this section (line 5) the word "effect" should be "effective."

In paragraph (e) (p. 56) of this section we emphasize that the language proposed by IHS should not be included for the same reasons as noted in the discussion concerning retrocession.

SUBPART D -- FINANCIAL MANAGEMENT

Standards for financial management (p.57) -- Paragraph (a) of this section was slightly revised in Albuquerque. IHS reported that this paragraph was acceptable to it as well as to OMB. The Bureau argues that the standards should be in accordance with OMB Circulars A-87, A-102, A-122 and 48 C.F.R. 31, as applicable, but this approach was disapproved in Albuquerque.

It was agreed in Albuquerque to delete paragraph (b)(3) so that the Secretary's review of a tribal contractor's financial management system is limited to a pre-award review and when warranted based on the Single Audit Act audit.

Allowable costs (p. 58) -- Paragraph (b) provides that allowable costs under a P.L. 93-638 contract are to be computed in accordance with cost principles set forth in certain OMB Circulars which are specified by date, A-87 (1/15/81) or A-122 (6/27/80), so that subsequent revisions of the circular do not automatically apply. We obtained a revision to this section to allow a tribal contractor the option of choosing either A-87 (tribal government) cost principles or those found in A-122 (non-profits). It is our opinion that A-87 can apply to all tribal contractors, whether they are the governing body of an Indian tribe or not, since all tribal organizations are instrumentalities of Indian tribes in that they contract under P.L. 93-638. Because some non-profit tribal organizations wanted to maintain A-122 it was retained as an option for qualifying non-profit organizations. This section also allows waiver by the Secretary of cost principles found inconsistent with the Act.

The April 3 draft (p. 58) at paragraph (b)(1) "Factors affecting allowability of costs" provides:

> "The Indian tribes or tribal organizations may use the allowable costs of self-determination awards to meet matching cost participation re-

> quirements under other federally supported projects."

We understand that both IHS and BIA question the appropriateness of this provision. In our opinion it clearly serves the purposes of P.L. 93-638. Thus, "638" funding should be treated like tribal funding, not like a Federal discretionary grant program, for "matching" purposes.

The April 3 draft retains a section on "allowability of selected items of cost," which modifies certain cost principles to further the goals of the Act. Some "selected items of costs" (p. 58) (b)(2)(i)(B) have been revised based on the Albuquerque Workshop as follows:

> "Professional service costs
>
> Cost of legal, accounting, consulting and related costs in connection with the prosecution or defense of claims against the Federal Government in court are unallowable, unless the Indian tribe or tribal organization is the prevailing party or the court determines that the position of the Indian tribe or tribal organization in the litigation was substantially justified. The cost of such services in connection with contract disputes or other matters related to the performance of the contract until a final remedy is reached are allowable."

Office of the General Counsel, HHS, has questioned this provision as going beyond the Equal Access to Justice Act (EAJA). Since recovery under EAJA is extremely difficult, we think that the revision is fully justified to assist tribes in asserting their rights under the Act.

While paragraph (b)(2)(i)(C) (p. 59) "Publication and printing costs" was approved in Albuquerque, the Bureau raised the issue that regulations of the Joint Committee on Printing & Binding set requirements on printing which may be inconsistent with this section. The requirements of the Joint Committee on Printing are intended to encourage the use of the Government Printing Office by federal agencies. No meaningful public purpose is served by imposing these requirements on Indian tribes. The Bureau has determined under the existing regulations that printing by tribal contractors in the performance of 638 contracts is "incidental" and that the GPO need not be used. See 41 C.F.R. §14H-70.206. There are, however, Joint Committee on Printing regulatory limitations even on "incidental" printing (pertaining to quantity, size and color of printing) which the Bureau proposes to incorporate into the Notice of Proposed Rule Making draft.

A new selected item of cost was added which permits fund-raising activities so long as the funds raised are used to further program goals and proceeds are treated as "program income" under the contract.

Language on "Rental costs" was expanded to include land and vehicles as well as space, subject to restrictions as to reasonableness and statutory restrictions.

The allowability of interest costs on loans for buildings acquired or completed after September 1980 (b)(iii)(D) (p. 60) is expanded to include reconstruction, remodeling and capital equipment (effective December 1988) and facilities acquired for Federal program use "through internal nonfederal funds."

Office of the General Counsel, HHS, questioned the lobbying clause (b)(iii)(E) (p. 60). We continue to object to a ban on the use of contract funds to communicate with the Congress and commend the agencies for revising this clause to deal only with elections. The ability of tribes to move toward increased self-determination is dependent on their ability to bring their problems to the attention of the Congress.

The right to employ multiple indirect rates or to use lump sum overhead agreements has been clarified.

A new paragraph was added after (3)(C) (p. 61) relating to indirect costs, which provides:

> "At an Indian tribe's or tribal organization's request, the Secretary shall provide assistance in the development of its indirect cost proposal(s)."

The language in (b)(3)(ii) (p. 61) pertaining to "cognizant Federal agency" which provides that the agency designated by OMB shall be responsible for negotiating with a tribal contractor and approving the indirect cost proposal was approved in

Albuquerque. The cognizant agency may be either Interior or HHS (but will be HHS if it is the only funding source -- we recommend inserting "federal" before "contracts and grants" to clarify this provision).

Since the Albuquerque Workshop, we have learned more about the scheduled transfer of the negotiation of indirect cost rate from the Office of Inspector General to a newly created office ("Indirect Cost Rate Division") within Interior's Office of Policy Budget and Administration. The reason for the planned transfer of rate-setting functions from OIG to the Office of Policy, Budget and Administration was a concern by OMB that there was a "conflict of functions" in having OIG negotiate indirect rates and audit the contracting process. The Policy Budget and Administration Office is equal in status to the OIG and is independent of the Assistant Secretary for Indian Affairs.

While we question the necessity of this transfer, we are greatly concerned with the proposed staffing and funding of this office. The FY1990 budget for the Office of the Secretary of the Interior allocates only $175,000 and 4 FTEs for the Indirect Cost Rate Division for the first year. This places a tremendous work load on personnel who may not have much experience with indirect cost negotiations. If the transfer is to be completed in FY1990, it must be adequately staffed and funded. Several of our tribal clients, as well as Chairman Udall and Congressmen Rhoades and Young, have brought this issue to the attention of Chairman Yates of the Interior Appropriations Subcommittee. In light of the fact that regulations will not be in place by the beginning of FY1990, we question whether it would be prudent to complete this transfer prior to implementation of the new regulations and assurances of adequate funding.

Indirect cost proposals shall be deemed approved within 180 days after receipt by the Federal cognizant agency unless declined within 120 days. Specific appeal provisions are provided for a declined indirect cost rate.

Revised language (p. 61b) reflects the concern of the Congress as to indirect cost shortfalls caused by Federal agency action, as follows:

> (A) "Theoretical over recoveries or other adverse adjustments shall not be considered in the calculation of indirect cost rates.
>
> (B) In those cases where federal limitations, either statutory or regulatory, exist prohibiting the reimbursement of the full negotiated indirect cost rate, such actual shortfalls shall be used in the calculation of need in future indirect cost negotiated agreements."

Availability of funds and Limitation of Cost (p. 61 or 61d) -- The Bureau has suggested placing this section in an appendix and deleting the final sentence contained in (b)(1) (p. 61d) which provides:

> "Notwithstanding the above, failure to supply written notice will not affect the rights of the

> Indian tribe or tribal organization under paragraph (b)(2) below."

The Bureau argues that tribes and tribal organizations should be required to provide written notice in advance of an overexpenditure. This change would conform the clause to the standard "limitation of cost" provision in current tribal cost reimbursement contracts.

We recommend the insertion at the beginning of paragraph (b) of the statement "The following shall apply in any cost-reimbursement contract." We understand that it is the intention of the agencies that contracts under the Act may be either "cost-reimbursable" or "fixed price" as at present. In paragraph (c) of this section ("limitation of price") (p. 61d), the last sentence, which would have treated savings from fixed price contracts as "program income," was deleted. In a fixed price contract, the excess of price above cost is not "program income." It is simply part of the price paid to the contractor for the product. "Program income" restrictions therefore, cannot apply to it.

In paragraph (d)(3) (carryover funding) (p. 62) we recommend revising this paragraph as follows for purposes of clarity:

> (3) "Unless additional justification is provided, unexpended funds shall be used for the same

> general purposes for which they were originally appropriated or authorized to be used under the self-determination contract.
>
> (4) Upon request of a tribe or tribal organization to reprogram carryover funds, the Secretary shall evaluate the proposal under:
>
> (a) the declination criteria contained in §102(a)(2) of the Act; and
>
> (b) limitations imposed upon the amount of funds that may be reprogrammed without Congressional approval.
>
> (i) The agency may administratively agree to reprogramming requests from the affected tribe or tribal organization, up to 25% of the affected line item (e.g., adult education, agricultural extension services, etc., without seeking Committee approval in advance).
>
> (ii) All such reprogramming shall be reported quarterly, in detail, by the tribe or tribal organization.
>
> (iii) All other reprogramming guidelines shall remain in effect, including the prohibition on new agency initiatives through reprogramming, and the requirement to submit all reorganizations through the reprogramming process for advance approval.
>
> (iv) This flexibility shall apply only to activities included under the tribe/agency operations category, and each such change must be requested by or approved by the affected tribe before the agency shall consider it."

The foregoing language is based on the FY88 House Approp. Rep. No. 171, pp. 42-43 (1987). While this was an experimental provision, we understand from the House Appropriations Subcommittee staff that this is still current policy.

Payment (p. 62) -- Paragraph (d) of this section was revised to provide that a tribal contractor could not be removed from the advance payment system without having received written notice providing no less than 60 days to remedy the deficiency. This should alleviate problems encountered by tribal contractors in the past.

Previous paragraph (g) of this section was deleted. This paragraph was considered superfluous.

The Bureau noted that advance payments (see paragraph (a) (p. 62)) may be improper without the Federal Acquisition Regulation (FAR) safeguards. The Bureau noted that the Solicitor's Office is reviewing this. Clearly, Congress did not intend to eliminate advance payments when it exempted contracts under the Act from the FAR.

Program Income (p. 63) -- This section has been revised to make clear that funding amounts shall not be reduced based on the receipt of program income. We note that paragraph (3) should read: "Income from payments of principal and interest on loans made with program income." In Albuquerque, a change from "project funds" to "program income" was approved.

Indemnity and insurance (p. 64) -- General liability insurance and professional medical malpractice insurance are major concerns to an Indian tribe or tribal organization contracting under the Act, especially for health services. We are troubled by actions taken by the Bureau and IHS relating to implementation of the general liability provisions. The reason for this is that the Bureau has requested, in its FY1990 Budget request, a one year postponement of the effective date mandated by amendments to the Act which would require the Secretaries to provide general liability insurance coverage to tribal contractors operating P.L. 93-638 contracts. The Bureau justifies this request by stating that:

> "This will allow the Department of Interior, Justice, and Health and Human Services, working with the Office of Management and Budget, sufficient time to address the significant administrative, legal, and budget implications of this requirement."

Both IHS and the Bureau should recall the words of Congress expressed in the Senate report accompanying the amendments to the Act:

> "It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs."

S. Rep. No. 100-274 at 9.

Section 102(a)(1) of the Act provides that beginning in FY1990, the respective Secretaries shall be responsible for obtaining or providing liability insurance for tribal contractors carrying out a contract or agreement under the Act, taking into consideration the extent to which claims are covered under the Federal Tort Claims Act (FTCA).

Both agencies have concluded that they cannot implement this statutory requirement in FY1990. However, as recently as April 4, 1989, in a hearing before the House Interior Appropriations Subcommittee on the FY1990 Bureau Budget when asked by Chairman Sidney Yates as to the reason for seeking a delay, the Bureau responded that it has been talking to a contractor who is studying the costs associated with the Federal government providing liability insurance, and the Bureau should have an estimate for general liability insurance costs within the month. When asked why the Bureau would then need a one-year postponement, it replied that the Department of Justice and OMB also have concerns which they believe have not been adequately addressed. As a result, the Bureau is not prepared to present a proposal in 1989. Pat Ragsdale, Acting Assistant Secretary, Indian Affairs, stated that the Bureau must work within the Administration to achieve a consensus as to an approach to this matter. Nevertheless, neither the Bureau nor the IHS has seen fit to request in their FY1990 Budget requests additional funding for general liability insurance. Tribal contractors will be faced again with redirecting scarce direct and indirect contract dollars to maintain general liability insurance.

We are troubled by the Administration's delay in resolving this matter. The Bureau proposes studying this issue and perhaps implementing the statutory provision for FY1991, almost two years after P.L. 100-472 was enacted.

We find this even more troubling due to the fact that general liability insurance must act as an umbrella policy to the Federal Tort Claims Act coverage extended to tribal contractors and their health professional employees. Tribal contractors should not be put at risk nor bear the cost of maintaining costly general liability insurance while the agencies study and discuss the means by which they are to carry out the intent of Congress. The Act requires that tribal contractors be funded at levels equal to the levels that the Bureau and IHS would have were they to operate the contract or agreement. Congress recognized that the payment of general liability insurance decreases the level of services available to Indian beneficiaries (see S. Rep. No. 100-274 at 26). Indian tribes and tribal contractors should demand that the Appropriations Committees provide additional funding to the IHS and Bureau's FY1990 budget to meet the ever increasing cost for maintaining general liability insurance.

Despite the public positions of the IHS and Bureau requesting a one-year delay in the implementation date for this section, the IHS draft regulations revision dated April 3, 1989, contains a general liability section which implements the statutory provision: "without reduction of funding to tribal programs." No explanation of the expected delay is provided, nor is any interim arrangement proposed. There appears to be a lack of coordination within the Federal agencies on this matter.

While the draft regulations will perhaps not be in place for at least another sixteen months (August 1990), we trust that the IHS and Bureau are prepared to abide by the final paragraph of this section of the April 3 draft which provides:

> "If the Secretary has not provided liability or equivalent coverage as provided herein by [FY] 1990, the Secretary shall reimburse an Indian tribe or tribal organization for the cost of such coverage without reducing the amount of funding available for services under the tribe or tribal organization's contracts or grants."

Federal Tort Claims Act provisions (p.64) -- Language was drafted and approved at Albuquerque which was the product of a collaborative effort between tribal attorneys and attorneys of the Office of the General Counsel, HHS. The final draft, however, notes that the IHS believes that there are legal issues still to be resolved. Our only question as to the April 3 draft is that clause (C) of paragraph (a)(iii) may go beyond the statutory language and lead to uncertainty in the scope of the FTCA protection by including all services under contract with IHS.

The draft regulations acknowledge that FTCA coverage provides the exclusive remedy a claimant may pursue for injury or death arising from the performance of medical or related functions of a tribal contractor. Of major import is the recognition, in regulations, that employees of a tribal contractor providing health related services, are deemed employees of the Public Health Service when they provide health services to Indian and non-Indian patients:

1. at the contract facility;
2. at a non-contract facility;
3. in emergencies, including the operation of emergency transport vehicles.

Furthermore, the draft regulations acknowledge that in certain circumstances, staff privileges must be obtained by contract employees and Commissioned Corps personnel at a non-contract facility which may require such individuals to provide reciprocal medical services to the general population treated at such facility under such circumstances as:

(a) cross covering other medical personnel;
(b) assisting other personnel with surgeries or procedures;
(c) assisting with unstable patients or at deliveries; or
(d) assisting in patient care situations where additional assistance by a physician is required.

The regulations also acknowledge that it is the scope of work set forth in the contract or agreement, not the source of funding, which determines the scope of FTCA coverage. If the scope of work is contemplated within the P.L. 93-638 contract or agreement and the employee is found to be in compliance with these regulations and the statutory requirements of §102(d) of the Act, he/she will be deemed an employee of the PHS for purposes of FTCA coverage.

Finally, the regulations acknowledge that health services may be extended to non-Indians under a number of circumstances as permitted or authorized by law or regulations. The Department of Health and Human Services has agreed to insert in the regulations the existing statutory and regulatory authorities which permit health services to non-Indians. The regulations contain language which provides express incorporation into any health care contract or agreement under the Act that: "For purposes of this section, the scope of the contract shall be deemed to include the provision of services to all Indian beneficiaries, and non-beneficiaries and non-Indians as provided herein" ((a)(2) p. 67).

It will be necessary to monitor the proposed rulemaking draft which IHS is presently engaged in preparing to assure that essential provisions of this section are retained. Office of the General Counsel, HHS attorneys have reiterated that the decision on FTCA coverage is reserved to the courts. While this statement is true, the P.L. 93-638 contract provisions and the scope of employment aid the court, as well as the Justice

Department (which would defend the United States in an FTCA suit) in reaching a favorable decision as to FTCA coverage. We trust, therefore, that the IHS and Bureau will advocate as broad an interpretation of §102(d) of the Act as possible.

The draft regulations seek to provide as broad a coverage as reasonably possible. It should be remembered that the United States is liable for the actions of medical personnel serving Native Americans prior to the contracting of a health service program by a tribal contractor. Congress recognized that the United States cannot divest itself of this obligation when a tribal contractor takes over the responsibility of providing health care. Prior to passage of P.L. 100-472, Congress stated that:

> "The United States has assumed a trust responsibility to provide health care to Native Americans. The intent of the Committee is to prevent the Federal government from divesting itself, through the self-determination process, of the obligation it has to properly carry out that responsibility. Under current law [prior to passage of P.L. 100-202 which extended FTCA coverage to tribal contractors], a self-determination contract with a tribal organization operates to actually relieve the United States of the liability which it had under the Federal Tort Claims Act before the contract was executed. In its place, the tribe is required to waive its immunity from suit up to the policy limits of its insurance, and then to be subjected to litigation without any of the protective and very restrictive provisions which apply to litigation under the Federal Tort Claims Act. The Indian Self-Determination Act was never intended to operate as a means for the United States to avoid the liability it would otherwise have under the Federal Tort Claims Act. The amendment to the Act will not increase the Federal government's expo-

> sure under the Federal Tort Claims Act. On the contrary, the amendment will only maintain such exposure at the same level that was associated with the operation of direct health care service programs by the Federal government prior to the enactment of the Indian Self-Determination Act."

S. Rep. No. 100-274 at 27, 28.

We urge the Office of the General Counsel to support the language contained in this section. Failure to advocate language which will allow as broad a coverage as possible under the FTCA will mean that tribal contractors will still have to purchase medical malpractice insurance to ensure that their employees are covered under a liability policy. This would be totally contrary to the intent of Congress with regard to this issue and will result in the expenditure of vast sums of scarce contract dollars.

Reporting (p. 70) -- This section implements section 5(f) of the Act which requires annual reporting by a tribal contractor to the Secretary of the amounts and purposes of expenditures made and information on the conduct of the program or service involved. Quarterly reports by tribal contractors on Standard Form 269 or 269(a) are also required.

Record retention and access to records (p. 70) -- Several revisions were approved in this section at Albuquerque but have not been accurately reflected in the April 3 draft as follows:

In paragraph (a)(2) "contract or award" was substituted for "project."

In paragraph (b)(1) it was agreed that the request of the Comptroller General and Secretary shall be a written request.

In paragraph (b)(2) (p. 71) it was agreed that the phrase "as and in a manner determined to be adequate by the appropriate Secretary," was to be deleted and the italicized language beginning "including" would be inserted in its place.

We wish to draw attention to a possible conflict which may exist between paragraph (e) of this section (p. 72) and paragraph (a) in the "Availability of information" section (p. 52). The last sentence of paragraph (e) provides that:

> "Indian tribes or tribal organizations are not required to permit public access to their records." (Emphasis added.)

Paragraph (a) of the "Availability of information" section (p. 52) provides that:

> **"Except as otherwise provided in these regulations and providing the release of information does not constitute an unwarranted invasion of personal privacy, the Indian tribe or tribal organization shall make all reports and information concerning the award available to the Indian people served or represented by the Indian tribe or tribal organization providing such requests are reasonable and necessary."** (Emphasis added.)

One could read the last sentence of paragraph (e) of the "Record retention and access to records" section (p. 72) to be the very limitation set forth in paragraph (a) of the "Availability of information" section. We therefore recommend moving the bold face proviso language in paragraph (a) to paragraph (e) so that the last sentence of paragraph (e) reads:

> "Indian tribes or tribal organizations are not required to permit public access to their records except as otherwise provided in these regulations."

A cross reference to the "Availability of information" section may also be helpful. Current Bureau regulations (25 C.F.R. §271.48) (attached) provide guidance as to Privacy Act and Freedom of Information Act requirements, and consideration should be given to including such provisions in the new regulations.

Audit (p. 72) -- The alternative draft proposal of the IHS which was distributed at the Albuquerque conference was adopted in place of the earlier audit provisions. The only section which was retained from the earlier provisions was paragraph (g), now paragraph (f), of this section. This paragraph allows for additional audits of tribal contractors beyond the audit required by the Single Audit Act of 1984 so long as such audit does not duplicate the findings of the original Single Audit Act audit and are "necessary to carry out [the agencies'] responsibilities on projects awarded under these regulations."

We note that language in this section provides that Indian tribes and tribal organizations are responsible for obtaining audits as required under the Single Audit Act and the provisions of OMB Circular A-128 which IHS notes is entitled "Audits of State and Local Governments." If a tribal organization is recognized by IHS as a State or local government for purposes of auditing, it should be entitled to that status for purposes of determining appropriate cost principles (i.e., it should be entitled to rely on Circular A-87, as contemplated by the April 3 draft).

Disputes (p. 73) -- This section referencing the Contracts Disputes Act of 1978 remains largely unchanged from Nashville. A new paragraph (k) was added which provides that: "A pending appeal shall not affect or constitute a barrier to the negotiation or award of a pending contract."

We recommend that paragraph (j) (p. 76) should be revised for clarity to read as follows:

> "Obligation to continue performance. Indian tribes and tribal organizations are required to continue performance during appeal of any claim, subject to the limitations of costs clause in any cost reimbursement contract."

We also note that the April 3 draft Disputes section, which is based on FAR §52.233-1 and is currently in use in IHS contracts, includes contract "adjustments" as claims subject to the Contract Disputes Act. It should be made clear that denials of contract modifications requested by the contractor are subject to declination appeals as previously discussed and that modifications requested by the Federal agency are barred except in the very limited circumstances already noted.

Closeout (p. 77) -- The Albuquerque Workshop revised paragraph (a)(1)-(3), created a new paragraph (c) "annual funding reconciliation" (p. 78) to clarify carryover procedures and deleted paragraph (d) which would allow multiple contract numbers for mature contracts.

All financial management provisions in the April 3 draft should be reviewed carefully by tribal accounting staff. Tribal organizations should also request the advice of certified accountants familiar with their programs as to seeking further revisions. As noted earlier, Ernst & Whinney, an accounting firm which is experienced in auditing contracts under the Act, has expressed concern that some of these provisions depart from professional practice.

SUBPART E -- PROPERTY MANAGEMENT

The original draft provisions for this section discussed in Nashville were replaced by provisions developed by the Bureau after considerable debate. This section warrants careful review. Several major issues still remain unresolved between the two Federal agencies.

Definitions (p. 79) -- Paragraph (c) of this section "Capitalized personal property" was revised to reflect an increase to $5,000 for the minimum value for such personal property.

The revised regulations note that the Bureau proposes to add a final definition "sensitive items" to cover personal property which, because of its nature, is subject to theft or pilferage. The Bureau stated in Albuquerque that such items would be handled as capitalized personal property.

Personal property (p. 80) -- The Bureau indicated that the threshold value of $25,000 as the value at which approval of the Secretary was required before personal property could be purchased under a contract was required by OMB Circular A-102.

Paragraph (B) on p. 81 of the April 3 draft provides that tribal contractors shall be given priority for the donation of excess personal property prior to the agency reporting such property to the GSA or to another Federal agency. Excess personal property is defined in the regulation draft (p. 79) as any property owned by a Federal agency, other than the Bureau or IHS, and determined by that agency as being excess to its needs. Surplus personal property, on the other hand, is defined (p. 80) as "personal property owned by a Federal agency other than the BIA or IHS which has been reported to GSA as excess and determined by the FGSA as surplus by the owning agency."

The priority among tribal contractors to receive excess Federal property is set out under (B)(2) (p. 81) of this section.

Pursuant to §105(f) of the Act, regulations should set forth the criteria under which the Bureau or IHS may donate title to personal property held in the United States to a tribal contractor.

Note that the regulations under this section also provide three alternative methods (options) which a tribal contractor may select for the management and control of personal property (pp. 84-86).

Real property management (p. 87) -- A major disagreement between the Bureau and the IHS exists as to whether they have authority to transfer title to real property to Indian tribes and tribal organizations contracting under the Act. The Bureau, after a thoughtful review of the various statutory authorities, and the involvement of a number of branches of the Interior Department, concluded that the agencies can transfer title to real property (in fee simple) to tribal contractors. The Office of the General Counsel, HHS, however, does not share this view. We are hopeful that Bureau and IHS officials will resolve this issue along the lines recommended by the Bureau, and we are looking into the legal issues in dispute.

Despite the misgivings of the IHS as to the legality of transferring title to real property to tribal contractors under the Act, the Bureau's draft proposal was approved at Albuquerque. This section therefore states that title to real property purchased by the awardee vests in the Federal government "until such property is donated by the Secretary under the provisions set forth in this Subpart 2.1-2(c)," and the tribal contractor shall hold legal title for the duration of the contract (p. 87).

Just as there are three methods (options) for the management and control of personal property, the Bureau draft proposal accepted at Albuquerque provides three methods for the management and control of real property (pp. 88, 89). The choice of methods availability to a tribal contractor is dependent upon the status of the tribal contractor.

Tribal contractors who operate mature contracts may choose from one of the three methods for management and control of real property. If the tribal contractor serves more than one Indian tribe, a tribal resolution from each tribal governing body served must be presented prior to transfer (p. 88). We summarize the three methods briefly:

Method 1 (p. 88): "Awardee Owned; Awardee Operated and Maintained" -- (only a tribal contractor operating a mature contract can select this method).

Legal title will vest in the tribal contractor upon transfer of the excess real property. The tribal contractor is solely responsible for operation and maintenance, including employee quarters. Proceeds of awardee sale or rental of real property shall be deposited into an account for operation of the contract and shall be treated as program income. Paragraph (4) (p. 89) of Method 1 nevertheless provides that: "Selection of this method shall not relieve the Secretary of his obligations for operations, maintenance, and repair of the real property." If this is the case, the word "solely" in paragraph (2) (p. 88) should be deleted for it suggests that no funding will be provided by the Secretary for O&M.

Paragraph (B) (p. 89) of Method 1 provides that upon either retrocession, discontinuance or termination of a contract, title to any real property donated or conveyed to the tribal contractor "shall revert to the Federal agency." This provision is required because the authorizing statutes which permit transfer of real property contain language relating to reversion of title under certain circumstances. See 25 U.S.C. §§293a, 443a.

Consideration should be given to a transfer of title to real property in trust for the Indian tribe or tribes served under the contract so as to avoid the assertion by states of jurisdiction and taxing authority over certain lands.

Method 2 (p. 89): "Government-Owned; Government Operation and Maintenance."

The tribal contractor does not hold legal title or interest in the real property nor may the tribal contractor sell, donate or convey the real property to a third party. The Secretary will provide for the tribal contractor's use of Federal facilities [presumably located on such real property] in accordance with Agency policies and procedures. Method 2 is available to tribal contractors operating term contracts. Despite the heading of this method, this paragraph is ambiguous as to which entity has the financial burden of providing for O&M.

Method 3 (p. 89): "Government-Owned; Awardee Operation and Maintenance."

Just as in Method 2, the tribal contractor does not hold legal title or interest in the real property "unless specifically provided otherwise by [the] terms of the self-determination contract." The last part of this sentence was revised to provide that all responsibility for proper O&M of the real property belongs to the "awardee" rather than the "awarding agency."

Under paragraph (2) of Method 3 (p. 89), the terms and conditions of O&M shall be in accordance with an O&M contract negotiated between the tribal contractor and the Bureau or IHS "contracting officer" prior to execution of a contract. The contract must contain an annual work plan for "routine" O&M and a facilities engineering deficiencies report. We recommend that the regulations make clear that O&M provisions should be included in the contract under which services are being provided. These should not be separate transactions.

Closely related to the issue of real property management is the matter of quarters management, when, under Method 2 or 3, the government retains title to the facilities. While the Bureau demonstrated flexibility on this matter, the IHS is still unwilling to allow contractors to keep rentals from quarters or to set rates for such rentals.

Regardless of which method is selected, the rental rates charged to Federal employees occupying quarters owned by the Federal government are to be determined and collected "only per the guidelines established in OMB Circulars A-18 (Policies on construction of family homes), A-25 (user charges) and A-45 (Policy governing charges for rental quarters and related facilities) and applicable BIA/IHS implementing regulations or directives." Despite objections by the tribal representatives present at Albuquerque, the Bureau was adamant on this point. Only when government owned quarters are used to house individuals who are not Federal employees and are not direct-hire contractor employees may the contractor charge full fair market value without administrative adjustments to the fair market value rate.

The April 3 draft provides for three alternative methods for quarters management. We summarize them briefly:

Method 1 (p. 90): "Awardee Owned and Operated." Funding for O&M is the responsibility of the "awardee" and can be paid from rental receipts, retained by such awardee, or from other contract funds. Rental rates may be set by the contractor.

Method 2 (p. 90): "Government Owned and Operated Facilities." If the Federal agency has responsibility for O&M, all rental rates charged shall be determined only in accordance with OMB Circulars A-18, A-25 and A-45 and applicable BIA or IHS implementing regulations. Under all circumstances where the Bureau or IHS has operation and maintenance responsibilities, rents charged and collected shall, within 5 working days of receipt by the awardee, be submitted "in the manner specified by the contracting officer, to the appropriate BIA or IHS office to be deposited into the proper account to be used only for management, operation and maintenance of such quarters."

Method 3 (p. 90): "Government Owned, Awardee Operated and Maintained." Rates charged to Federal employees and direct hire employees must be in conformance with OMB Circulars A-18, A-25, and A-45 and applicable agency regulations. Any other individual must pay fair market value rates in accordance with the circulars. It would be more consistent with the goals and provisions of P.L. 93-638 to permit quarters to be managed by contractors under guidelines proposed by the contractor and approved by the Federal agency. The Bureau agreed to delete the specific references to the various OMB Circulars and simply include the applicable rental rates. We urge, instead, that quarters should be managed (and rentals set) under the contractor's guidelines subject to review and approval by the agency.

IHS failed to delete paragraph (2) (p. 91) which was stricken at the Albuquerque Workshop. Paragraph (2) represents the IHS's position that all rental receipts must be forwarded to the agency, even when the tribal contractor is responsible for O&M. Both agencies have allowed the tribal contractor to collect rental receipts and deposit them into an awardee-managed, separate bank account to be applied by the tribal contractor to the operation, maintenance and management of such quarters in the past. The IHS, on the other hand, now insists that a tribal contractor must collect all rents and submit, within 5 days, the full amount to the appropriate IHS officer. Under the IHS's proposal, there is no guarantee that such funds will be returned in full to the awardee for the operation, maintenance and management of the quarters. IHS insistence on this procedure places a tribal contractor in the awkward position of being responsible for the operation and maintenance of such facilities, but does not allow the tribal contractor to retain the rental receipts collected so as to have a ready and available source of funding for needed repairs and routine maintenance work. The Bureau's position which recognizes the practical desirability of keeping rental receipts at their source should be accepted by both agencies. There is no legal or programmatic justification for the inconsistent positions.

SUBPART F -- PROCUREMENT MANAGEMENT SYSTEM

Procurement system standards (p. 92) -- The draft version which came out of the Nashville session was completely revised in Albuquerque.

This section authorizes an Indian tribe or tribal organization to procure property and services in accordance with tribal procedures, if the appropriate Secretary "concurs" with such procedures, or a tribal contractor may choose to abide by the procedures set forth in paragraphs (b)-(h) of this subpart (pp. 92-97). Tribal staff familiar with procurement issues should review these provisions.

The April 3 draft provides that Federal concurrence or nonconcurrence in the tribal contractor's tribal procurement procedures will be made "at the Secretarial level" and shall be provided to the tribal contractor within 60 days of such request (p. 92). We recommend that the authority to approve such procedures be delegated to Area Staff (subject to appeal). The April 3 draft makes clear that procurement procedures which have been previously approved by the Secretary are acceptable. However, the regulations should be crystal clear that contractors whose procedures currently have contracting officer approval do not need approval again at any level.

Paragraph (h) (p. 96), which is part of the Secretary's procedures relating to subcontractors, was revised to reflect that the Davis-Bacon Act does not apply where the subcontractor is the recognized governing body of the Indian tribe or tribal organization. Language was inserted in paragraph (h)(11) (p. 97) to require notice of Indian preference in training and employment.

The Bureau has advocated alternative language to cross reference OMB Circular A-102. The Bureau also suggested that a provision should be included in paragraphs (h) and (i) that would prohibit tribal contractors from reaching settlement agreements which would directly or indirectly obligate the Federal agencies beyond the funds in the contract.

We note that there is no language pertaining to the appropriate appeals procedure to follow in the event that the Secretary fails to concur in the procurement system proposed by a tribal contractor. In the event the proposal is submitted prior to the granting of a P.L. 93-638 contract or agreement, the declination criteria should apply. If the procurement proposal is submitted after the granting of a contract or agreement, the contract disputes provisions should be applicable.

We are concerned here (and in other places in the draft) that differing and possibly inconsistent uses of the terms "Secretary," "federal government" and "federal agency" throughout the April 3 draft may lead to confusion as to the federal official authorized to make a decision and the appeal procedure which is available from his decision. Further study and clarification is required prior to the publication of uniform and consistent regulations applicable to both agencies as to the use of such terms and other terms designating particular agency officials.

SUBPART G -- GRANTS AND COOPERATIVE AGREEMENTS

This section was also entirely rewritten at the Albuquerque Workshop. Both the IHS and the Bureau proposed alternative language to the Nashville draft. Except for one provision from the Bureau's proposal, the entire IHS alternative draft language was approved in Albuquerque.

Subpart G applies to three types of grants: (1) §103(a) tribal government and improvement and planning grants of the Department of Interior; (2) §103(b) development and planning health grants of the Department of Health and Human Services; and (3) §103(e) technical assistance grants from either IHS or the Bureau.

Applicability (p.98) -- Paragraph (c) was added to this section to recognize that grants were also available from the Department of the Interior to strengthen or improve tribal government, improve the capacity of a tribal organization to contract under §102 of the Act and acquire land.

Eligibility; Availability of funds and application dates (p. 99) -- A number of changes were made to this section to address concerns of small Indian tribes. Language was added which provides that eligibility may be restricted by priorities established in the Department's annual budget justification or in legislation and paragraph (d) (p. 100) was added which provides that:

> "Nothing in this subpart shall prohibit the Secretary from providing special consideration to tribes or tribal organizations based on size, target population or demonstrated need."

Paragraph (e) was also added which requires the Secretary to publish 90 days prior to the application due date the total amount of grant funds available, including minimum and maximum funding levels and portions of funds to be retained by the Secretary for administrative and other costs.

Application (p. 100) -- As noted in earlier sections, we believe that Federal guidelines applicable to Indian tribes due to their status as "states or local governments" are also applicable to tribal organizations which are instrumentalities of Federally recognized Indian tribes. Nevertheless, regulations continue to distinguish Indian tribes from non-governing body tribal organizations for purposes of assigning Federal guidelines which the entity must comply with. This section is no different. Paragraph (a) (p. 100) requires different forms for applying for grants pursuant to 45 C.F.R. Part 92 (for governmental entities) and 45 C.F.R. Part 74 (for all other entities).

Use of project funds (p. 102) -- We note that paragraph (b) (p. 103) provides that a tribal contractor may choose to abide by the requirements of paragraph (b) in lieu of the standard grant award requirements contained in paragraph (a). Paragraph (b)(5) (p. 103), however, is rather vague, insofar as it pertains to "any other applicable laws." The Bureau and IHS may wish to specify which laws they have in mind as a tribal contractor would rightfully be hesitant to opt for complying with the requirements of paragraph (b) when it is uncertain just what those requirements are.

We also question whether the regulations listed under (b)(7) should be applicable to tribal contractor grants under this section.

Rescission of grants (p. 105) -- We believe that the rescission of discretionary grants section may require revision. As noted in paragraphs (a) and (c) under "applicability"

(p. 98), this section applies to grants and cooperative agreements under §103(a), (b) and (e) of P.L. 93-638. Section 109 of the the Act provides for rescission of such grants if there is a violation of rights, endangerment to health, safety, or welfare; or gross negligence or mismanagement. Tribal contractors, however, are now entitled to a hearing "on the record" under §109 of the Act (§554 "on the record adjudications"). This is a reference to procedures under Title 5 of the U.S. Code. Existing regulations of the IHS which govern these grants (42 C.F.R. Part 36 Subpart G), however, provide for an informal procedure for resolution of post-award grant disputes prior to submission to the Department Grant Appeals Board. We question whether the Board has jurisdiction to hear appeals which are required by statute to be "on the record" adjudications. We note that the Bureau concludes that: "Rescission of grants should be incorporated into Appeals section."

SUBPART H -- ADMINISTRATIVE REQUIREMENTS FOR CONSTRUCTION

For our report on this subpart, please refer to our memorandum of April 5, 1989, entitled: "Report on construction workgroup at Albuquerque - 638 regulation drafting workshop." We will continue to provide separate reports on the development of the construction regulations.

25 CFR § 271.48 for use with Memorandum
Page 85 (Record retention and access to records)

§ 271.48 Freedom of information.

(a) Unless otherwise required by law, the Bureau shall not place restrictions on tribal contractors which will limit public access to the tribal contractors' records except when records must remain confidential

(b) A tribal contractor under this part shall make all reports and information concerning the contract, including the report required under § 271.49, available to the Indian people which the contractor serves or represents. Reports and information may be withheld from disclosure only when both of the following conditions exist:

(1) The reports and information fall within one of the following exempt categories:

(i) Specifically required by statute or Executive Order to be kept secret.

(ii) Related solely to internal personnel rules and practices of the Bureau.

(iii) Commercial or financial information obtained from a person or firm or a privileged or confidential basis.

(iv) Memoranda or letters between agencies of the Federal Government which would not be available by law to a party other than the Federal Government in litigation with the Federal Government.

(v) Personnel, medical, and similar files where disclosure would be a clearly unwarranted invasion of personal privacy.

(vi) Investigatory records compiled for law enforcement purposes when production of the records would:

(A) Interfere with enforcement proceedings;

(B) Deprive a person of a right to a fair trial;

(C) Be an unwarranted invasion of personal privacy;

(D) Disclose the identity of a confidential source and confidential information furnished only by the confidential source;

(E) Disclose investigative techniques and procedures; or

(F) Endanger the life or physical safety of law enforcement personnel.

(vii) Contained in or related to examination, operating, or condition reports prepared for the use of an agency of the Federal Government responsible for the regulation or supervision of financial institutions.

(viii) Geological and geophysical information and data concerning wells.

(2) Disclosure is prohibited by statute or Executive Order or sound grounds exist for using the exemption given in paragraph (b)(1) of this section.

(c) A request to inspect or copy reports and information shall be in writing and must reasonably describe the reports and information requested. The request may be delivered or mailed to the tribal contractor. Within ten working days after receiving the request, the tribal contractor shall determine whether to grant or deny the request. The requester shall be notified immediately of the determination.

(d) The time limit for making a determination may be extended up to an additional ten working days for good reason. The requester shall be notified in writing of the extension, reasons for the extension, and date on which the determination is expected to be made.

Report on Construction Regulations

Supplied by Harold M. Gross, Esq., of Hobbs, Straus, Dean & Wilder. Mr. Gross has been designated "Tribal Co-Chair" of the Construction Work Group.

Any ambiguity as to whether Congress intended to provide to Indian tribes the right to contract for, and carry out, "construction activities" under the Indian Self-Determination Act (P.L. 93-638) was clearly put to rest by the 1988 amendments to that Act.

The 1988 amendments added to Section 4 of the Act (the definitions section) the following new definition:

> "(a) 'construction programs' means programs for the planning, construction, design, construction, repair, improvement, and expansion of buildings and facilities, including but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, and water conservation, flood control, or port facilities."

The newly defined term "construction programs" was then inserted into the Act at Section 102(a)(1) to require the Secretary of the Interior upon the request of any Indian tribe, to enter into a self-determination contract with a tribal organization to plan, conduct, and administer programs, or portions thereof, including construction programs. Construction programs provided by the Secretary of Health and Human Services, and for Indians by other Departments are specifically included.

Both the Senate and House Committee reports make clear that the term "self-determination contract means an intergovernmental contract that is not a procurement contract." The Senate report states:

> "This definition recognizes the unique nature of self-determination contracts between the Federal Government and Indian tribal governments, or tribal organizations .... The Committee amendment also makes clear that self-determination contracts are not procurement contracts, as defined in the Federal Grant and Cooperative Agreement Act of 1977, and that the system of federal acquisition regulations contained in Title 41 of the Code of Federal Regulations should not apply to self-determination contracts."

The purpose of the Committee was clear:

> "The elimination of otherwise applicable federal procurement laws and acquisition regulations combined with authorization by the Committee amendment of so-called "mature contracts" is intended to decrease the volume of contract compliance and reporting requirements associated with tribal contracts, and to decrease the volume of unnecessary contract monitoring requirements on the Federal agencies." (S.Rep. No. 100-274, p. 19.)

The Committee Report carefully explains the intent of the Committees carrying the bill:

> "Section 103. Definitions. - New definitions are added to the Indian Self-Determination Act to clarify the meaning of terms used in the Act.
>
> "The term 'construction programs' is defined in order to make clear the intent of the Congress that Indian tribes have the right to contract with the appropriate Secretary under the authority of the Indian Self-Determination Act to carry out construction activities and programs including the planning, design, construction, repair,

> rehabilitation, improvement, and expansion of buildings or facilities. In addition to the specific programs listed in the statute, the term is intended to include pre- and post-construction costs such as site preparation, dredging, land clearance and reclamation. The term 'construction programs' also includes programs to construct facilities related to natural resource projects such as timber access roads and fish passage facilities." (S.Rep. No. 100-274, 100th Cong., 1st Sess, p. 16.)

Under the revised Section 103(a) of the amended Act, the Secretary of the Interior is authorized, upon the request of any Indian tribe ... to contract with or make a grant or grants to any tribal organization for, among other things, the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources.

And under Section 103(b), the Secretary of Health and Human Services, may, in accord with regulations adopted pursuant to Section 107 of the Act, make grants to any Indian tribe or tribal organization for the development, construction, ... or maintenance of adequate facilities ... . (Emphasis added.)

P.L. 93-638 had previously provided that contacts with tribal organizations accord with all Federal contracting laws and regulations except that, in the discretion of the appropriate Secretary, such contracts could be negotiated without advertising and need not conform with the bonding requirements of the Act of August 24, 1935 (49 Stat. 793), as amended. In 1984, the appropriate Secretary was given authority to waive any provisions of such contracting laws or regulations determined inappropriate for the purpose of the contract involved or inconsistent with the provisions of the Self-Determination Act.

In the 1988 amendments, the Committees in part were responding to complaints that inappropriate application of federal procurement laws and acquisition regulations to self-determination contacts had resulted in excessive paperwork and unduly burdensome reporting requirements. (S.Rep. No. 100-274, p. 7.) As a result, a further provision was added at Section 105(a) that federal procurement laws and the system of federal acquisition requirements, contained in Title 41 and Title 48 of the Code of Federal Regulations, not apply to Indian self-determination contracts. (S.Rep. No. 100-274, p. 29.)

The House adopted the 1988 amendments first (October 27, 1987), including total exemption from federal procurement laws and FAR regulations. The Senate followed on May 27, 1988, also adopting a total exemption of self-determination contracts, including construction contracts, from federal procurement laws and FAR regulations.

But, on September 9, 1988, the House concurred in the Senate amendment, with an amendment of its own. One small part of this amendment included, for the first time, Administration-proposed language which, without a word of floor explanation, modified the exemption which both houses had previously passed, and added it to Section 105(a) of the Act.

The exemption, as amended, read:

> "Provided further, that, except for constructions contracts (or sub-contracts in such cases where the tribal contractor has sub-contracted the activity), the office of Federal Procurement Policy Act (88 Stat. 796; 41 U.S.C. 401 et seq.) and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contracts."

By the same process, and again without a word of explanation, the language previously adopted by both Houses defining a self-determination contract in Section 4(j) was amended to read:

> "Provided, that except as provided [sic] the last provision in section 105(a) of this Act, no contract entered into pursuant to this Act shall be construed to be a procurement contract."

Even as amended, however, the last provision of section 105(a) makes no provision for treating any 638 contract as a procurement contract.

One week later, on September 15, 1988, the Senate concurred in the House amendment to the Senate amendment, again without explanation to account for this particular change, and this version of the amendments became law.

When the Construction Workgroup was established, to help negotiate regulations for the newly amended P.L. 93-638 (now, technically, P.L. 100-472), debate quickly focused on the meaning of the language "except for construction contracts (or sub-contracts in such cases where the tribal contractor has sub-contracted the activity)."

Since this language merely creates an exception to an exemption, and since there is nothing in the legislative record to explain it, the issue is how much of an exception to the exemption from FARs and federal procurement laws was intended. This issue is still mostly unresolved.

The tribal representatives to the Construction Workgroup were virtually unanimous in insisting that the new language did nothing more than deny the blanket exemption from FARs (which applied to non-construction contracts) to certain construction contracts. It continued to permit the Secretary to waive some or all FARs for the purpose of regulations or on an individual basis if they were inappropriate or inconsistent with the purposes of the Act.

Through the Nashville and Albuquerque regulation drafting sessions the Construction Workgroup resolved several construction-related issues which were not FAR-related, while a subgroup of the Construction Workgroup discussed the FARs.

At the conclusion of the Albuquerque Workshop, on March 24, 1989, the Construction Workshop had reduced to eleven the number of special construction-related provisions it believed should be written as regulations for 638 construction contracts. With these exceptions, the draft regulations developed by the other regulation-writing groups were thought sufficient. The Albuquerque Workshop adopted the recommendations of the Construction Workgroup.

As to the eleven draft regulations, federal representatives noted some disagreement with five of them. These disagreements varied widely in relative importance.

These are:

(1) federal insistence on including in the regulations a warning that any modification of an existing self-determination contract that would create new or additional space with BIA, IHS or Medicare/Medicaid reimbursable funds requires specific prior approval of the Secretary;

(2) spelling out by program specific mandatory reporting requirements in addition to the general reporting requirements already set out in the general draft regulations;

(3) mandatory withdrawal of "savings" or unexpended contract funds upon the completion of construction, for reprogramming, rather than leaving the funds with the contracting tribe for purposes not inconsistent with the Act;

(4) mandatory imposition on Indian tribes of all regulations developed under the Brooks Act and currently applicable to A/E contractors. The tribal representatives offered a substitute regulation which would fully comply with the language and intent of the Brooks Act;[1] and

(5) incorporating by reference in the 638 regulations FAR references, rather than spelling out the regulations themselves. The tribal representatives unanimously believe that all applicable regulations should be clear, as succinct as possible, and appear in a single place in the Code of Federal Regulations, for easy reference.

The Workgroup decided that separate appendices to the construction regulations should set out (or list) any applicable FARs or procurement regulations to be mandated in 638 construction contracts, by program to which they applied.

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[1] See Appendix I.

The view was widely expressed, for example, that contracts under the Housing Improvement Program (HIP) could be operated without mandating any FARS as contract requirements, and the BIA Director of the HIP program was prepared to recommend this position.

The subgroup on FARs indicated that of the approximately 543 FARs in federal regulations, some 339 of these had no relevance to Indian self-determination contracts and should be waived.

Since the Albuquerque meeting, by agreement, a tribal workgroup has continued to examine the FARs.

A few FARs are presently agreed on by all to be relevant to all 638 contracts and acceptable in their present language.

Others are relevant to some, but not all programs; and even those that are useful, may need language modification to be understood.

Often they cross-reference other regulations, so that a seemingly simple regulation can bring in pages of regulations, many of them controversial or objectionable.

The federal representatives had no incentive to work at boiling down FARs, and were concerned about limitations on their authority. At the Albuquerque session, they agreed to serve as resources for tribal representatives, who undertook to keep working on the FARs.

That ongoing process has continued to operate, taking federal regulations designed to govern relations between federal procurement officers and competitive procurement bidders and apply them to self-determination construction contracts between tribes and the United States. Shortly, the tribal representatives hope to present their version of these draft regulations to the steering committee and to the IHS and BIA. As an increasing number of tribes undertake 638 construction contracts, it is important that the mistakes of overregulation and too much bureaucracy be avoided.

Given the Administration's floor amendment which has thrown unnecessary confusion into this area, and the resistance of the agencies to changes in federal procurement policies, developing acceptable regulations in this area will continue to be a struggle in which the assistance of Congress will be needed.

###

APPENDIX I

This Attachment sets out the alternative recommended requirements for 638 construction contracts involving architect or engineer procurement. (see § 271.6 of Subpart H).

The tribal representatives recommend that the regulations governing A/E services for 638 construction contracts read, as follows:

> In compliance with the Brooks Act, Indian tribes and tribal organizations contracting to provide architectural and engineering services shall publicly announce all requirements for A/E services, and negotiate contracts for these services based on the demonstrated competence and qualifications of prospective contractors to perform the services required at fair and reasonable prices.

The federal representatives recommend the regulation read, as follows:

> Indian tribes and tribal organizations contracting to provide A/E services shall comply with the Brooks Act, P.L. 92-582. (FAR 36.6). Unless waived by the Secretary, contracts for A/E and construction services for projects shall contain the applicable FAR's listed in Appendix A for the respective agency and construction program.

The full text of the Brooks Act, P.L. 92-582, is attached. It consists of four sections. Sec. 901 defines three terms, "firm", "agency head", and "architectural and engineering services". Sec. 902 declares a policy of the federal government "to publicly announce all requirements for A/E services, and to negotiate contracts for A/E services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices."

It is at least arguable that this policy may not apply to Indian tribes or tribal organizations at all, since the language of the Brooks Act does not cover the situation of a tribal 638 contract to construct a federally owned facility to serve the Tribe. The question is whether the federal government has a need for A/E service or whether the Tribe does. Moreover, this section imposes no legal requirements. Even the policy it announces merely requires a public announcement and negotiations to attain certain ends. Moreover, even if the federal policy does apply to tribes or tribal organizations requiring A/E services under a 638 contract with the federal government, the language the tribal

638 contract with the federal government. the language the tribal representatives have suggested would require 638 contractors hiring architects to be in exact compliance with the announced federal policy.

Sec. 903 requires the "agency head" [clearly defined in Sec. 901 as the Secretary, Administrator, or head of a department, agency or bureau of the Federal Government [emphasis supplied] -- not a tribe or tribal organization, in the procurement of A/E services, to "encourage" [not "require"] A/E firms to submit certain data. It requires the same "agency head" to evaluate that data, plus any new data, and conduct discussions with at least three A/E firms, and then to select, based upon his published criteria, at least three firms in order of preference.

It gives the "agency head" no authority to impose this requirement on Indian tribes or tribal organizations, in or out of a 638 construction contract.

Sec. 904.(a) requires the agency head to negotiate a contract with the highest qualified A/E firm at prices which are fair and reasonable to the Government.

The tribal provision above would require the same of a tribe or tribal organization.

Sec. 904 (a) requires the agency head to take certain factors into account in deciding what is fair and reasonable compensation.

Nothing in the Brooks Act imposes this requirement on tribes or tribal organizations or authorizes the Secretary to impose this requirement on tribes or tribal organizations. Nevertheless, it would not be unreasonable for the Secretary to negotiate with tribes or tribal organizations to include such factors in their 638 contracts. Even without the tribal representatives' suggested regulation, the Secretary's authority to negotiate contracts would permit him to do so. But that is different from requiring tribes to do so by regulation.

Sec. 904(b) and (c) merely further elaborate the selection process to be followed by the "agency head". Here, however, the language of the Brooks Act is advisory, telling the agency head what he "should" do, until he is finally mandated to reach agreement. None of this language applies to anyone who does not meet the definition of "agency head", nor is there any authorization in the Brooks Act (or anywhere else) to impose this process on Indian tribes.

***

Since Appendix A of Subpart H is not yet complete, it is impossible to determine what additional requirements the second sentence of the suggested federal representatives' recommendation might impose in any given case. However, if this process works as we envision it, the additional requirements will be clear, understandable, and agreed to by tribal representatives.

Hence, this analysis confines itself to the first sentence, which is sufficient to illustrate the point. The language suggested by the feds seems innocuous enough, requiring compliance with the Brooks Act. In the analysis above, we demonstrate that the language suggested by the tribal reps does comply with the Brooks Act, to the exact extent that Act is applicable to Indian tribes.

But suppose the analysis were not available, and the only available guidance was the feds' suggested language, substituted for the tribal reps' language.

To begin with, the federal proposal violates our view that all of the 638 regs should be in one place, not incorporated by reference. A prospective tribal 638 contractor not familiar with the Brooks Act gets no guidance from a requirement that he comply with the Brooks Act. Fine, but what does the Brooks Act require? The Brooks Act, (40 U.S.C. §§ 541-544; 86 Stat. 1278), is fairly simple and straightforward. (See above.)

Then there is a FAR reference: (FAR 36.6). Again, no guidance to the prospective contractor as to what is required of him. The regulation cited initially appeared in the Federal Register of September 19, 1983, at page 42362 (Title 48, C.F.R., Chap. 1, Subchapter F, Part 36 of the Federal Acquisition Regulations), which, in 1983 supposedly replaced the Federal Procurement Regulations -- or did they? -- see below.

Subpart 36.6 (which is FAR 36.6), occupies three full pages of the Federal Register (attached). As we know, it "prescribes policies and procedures applicable to the acquisition of A/E services. It consists of nine separate regulations. One of these contains five sub-regulations. Another has four sub-regulations.

Only one of these regulations makes specific reference to the Brooks Act. (§36.601-Policy). It states: "The Government shall publicly announce all requirements for A/E services, and negotiate contracts for these services based on the demonstrated competence and qualifications of prospective contractors to perform the services required at fair and reasonable prices. [citing the Brooks Act, by citation, not name.] Sources for A/E services shall be selected in accordance with the procedures in this subpart, rather than the formal advertising or source selection procedures in Parts 14 or 15 of this regulation."

Our hypothetical prospective contractor now, at last, has some guidance about what is expected of him. But what are the "procedures in this subpart"? Well, they include six different selection criteria. They also require an agency acquiring A/E services to provide for one or more permanent or ad hoc A/E evaluation boards composed of members with experience in architecture, engineering, construction and [not "or"] government. They require maintenance of data on architecture firms.

They provide numerous references to "agencies" and "contracting officers" which, if these references apply at all, apply only by analogy. But regulations can't apply by analogy. They have to be rewritten to cover 638 construction contracts, if needed. On the other hand, if some parts are inapplicable, who decides what is applicable from the three Federal Register pages, and when? Unless the actual regulation, not the numerical reference is used, the Tribe may have one set of requirements in mind and the "Secretary" or the architect may have quite another. In which case, they may not have the "meeting of the minds" which a contract requires.

Many of the words used in Subpart 36.6 are terms to which special meanings are attributed in the 20 definitions set out in Part 2 of the FAR regulations. But how would you know that, if you only looked at FAR 36.6? Then again, maybe its best not to know how these words and phrases are defined, because they lose their special meaning "when they are used in a context which clearly requires a different meaning." Now, who decides whether the use of a word in a particular sentence has its regular meaning or a different meaning, especially if the only thing in the 638 regulations is a FAR number?

"Contract", for example, means, in part, "a mutually binding legal relationship obligating the seller to furnish supplies or services and the buyer to pay for them." How does that play against the 638 provision giving a tribe the unilateral right to retrocede? Or the federal government's right to terminate unilaterally a contract for its own convenience?

Obviously, if you just cite numbers you don't have to think about any of these things, but what does the contract which just cites numbers mean? Not to unduly prolong this, we won't discuss all the problems in Subpart 36.6, since its attached and you can identify your own. But lets take one more, which is also present in several other sections:

"36.609-3 Work oversight in A/E contracts. The contracting officer shall insert the clause at 52.236-24, Work Oversight in A/E Contracts, in A/E contracts."

Oh, didn't we tell you: to examine the actual required language which § 36.6 mandates, you have to go to another Subpart of the FARs, Subpart 52.236. But, does this particular requirement apply to a 638 construction contract? If so, who is the "contracting officer"? The term is one of those defined in Subpart 2.1. The definition goes on at some length, but still doesn't clear up the question of whether we are talking about a federal contracting officer inserting a provision in a contract with the tribe, or whether we are talking about a tribal contracting officer inserting a provision in a contract with an architect. Of course, the language was written for a situation where the federal government has a contract with an architect, so we don't know whether its applies here at all. And we don't know whether the term "contracting officer" has its Subpart 2.1 meaning, or is in a context where it has another meaning. And we still don't know what is required, without going to Subpart 52.236-24, which requires the following language be inserted:

"The extent and character of the work to be done by the Contractor shall be done subject to the general oversight, supervision, direction, control, and approval of the Contracting Officer."

Now it has become very important to determine who the contracting officer is, because if this language applies, and refers to a fed, our hypothetical, prospective tribal contractor might not have a Self-Determination contract at all. And could someone please point out what language in the Brooks Act requires or even authorizes that this clause be inserted in an Indian Self-Determination construction contract, or even a non-Indian architect procurement contract with the U.S.?

This exercise is simple, compared with attempting to determine what the Brooks Act requires of tribal contractors under existing 638 regulations. For the further edification of those who have come this far (FAR?) I have attached the present HHS 638 regulation for A/E procurement (41 CFR § 3-4.6008) and the regulations referenced therein.

(Part 1-18, Part 1-4.10 of 41 CFR) and 42 CFR Part 36. If anyone reading this can explain what is required of a tribal contractor hiring an architect under a 638 subcontract, or even what language is presently required in the contract, please contact me.

***

Public Law 92-582

October 27, 1972
[H. R. 12807]

AN ACT

To amend the Federal Property and Administrative Services Act of 1949 in order to establish Federal policy concerning the selection of firms and individuals to perform architectural, engineering, and related services for the Federal Government.

Architects and engineers.
Federal selection policy, establishment.
63 Stat. 377;
82 Stat. 1104.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.) is amended by adding at the end thereof the following new title:

"TITLE IX—SELECTION OF ARCHITECTS AND ENGINEERS

"DEFINITIONS

"Sec. 901. As used in this title—

"(1) The term 'firm' means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

"(2) The term 'agency head' means the Secretary, Administrator, or head of a department, agency, or bureau of the Federal Government.

"(3) The term 'architectural and engineering services' includes those professional services of an architectural or engineering nature as well

as incidental services that members of these professions and those in their employ may logically or justifiably perform.

"POLICY

"Sec. 902. The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

"REQUESTS FOR DATA ON ARCHITECTURAL AND ENGINEERING SERVICES

"Sec. 903. In the procurement of architectural and engineering services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified to provide the services required.

"NEGOTIATION OF CONTRACTS FOR ARCHITECTURAL AND ENGINEERING SERVICES

"Sec. 904. (a) The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof.

"(b) Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.

"(c) Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached."

Approved October 27, 1972.

36.521 Specifications and drawings for constructions.

The contracting officer shall insert the clause at 52.236-21, Specifications and Drawings for Construction, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation. When the Government needs record drawings the contracting officer shall (a) use the clause with its Alternate I, if reproducible shop drawings are needed, or (b) use the clause with Alternate II, if reproducible shop drawings are not needed.

SUBPART 36.6—ARCHITECT-ENGINEER SERVICES

36.600 Scope of subpart.

This subpart prescribes policies and procedures applicable to the acquisition of architect-engineer services.

36.601 Policy.

The Government shall publicly announce all requirements for architect-engineer services, and negotiate contracts for these services based on the demonstrated competence and qualifications of prospective contractors to perform the services required at fair and reasonable prices. (See Pub. L. 92-582, 40 U.S.C. 541 et seq.) Sources for architect-engineer contracts shall be selected in accordance with the procedures in this subpart, rather than the formal advertising or source selection procedures prescribed in Parts 14 and 15 of this regulation.

36.602 Selection of firms for architect-engineer contracts.

36.602-1 Selection criteria.

(a) Agencies shall evaluate each potential contractor in terms of its—

(1) Professional qualifications necessary for satisfactory performance of required services;

(2) Specialized experience and technical competence in the type of work required;

(3) Capacity to accomplish the work in the required time;

(4) Past performance on contracts with Government agencies and private industry in terms of cost control, quality of work, and compliance with performance schedules;

(5) Location in the general geographical area of the project and knowledge of the locality of the project; *provided*, that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project; and

(6) Acceptability under other appropriate evaluation criteria.

(b) When the use of design competition is approved by the agency head or a designee, agencies may evaluate firms on the basis of their conceptual design of the project. Design competition may be used when—

(1) Unique situations exist involving prestige projects, such as the design of memorials and structures of unusual national significance;

(2) Sufficient time is available for the production and evaluation of conceptual designs; and

(3) The design competition, with its costs, will substantially benefit the project.

36.602-2 Evaluation boards.

(a) When acquiring architect-engineer services, an agency shall provide for one or more permanent or ad hoc architect-engineer evaluation boards (which may include preselection boards when authorized by agency regulations) to be composed of members who, collectively, have experience in architecture, engineering, construction, and Government and related acquisition matters. Members shall be appointed from among highly qualified professional employees of the agency or other agencies, and if authorized by agency procedure, private practitioners of architecture, engineering, or related professions. One Government member of each board shall be designated as the chairperson.

(b) No firm shall be eligible for award of an architect-engineer contract during the period in which any of its principals or associates are participating as members of the awarding agency's evaluation board.

36.602-3 Evaluation board functions.

Under the general direction of the head of the contracting activity, an evaluation board shall perform the following functions:

(a) Review the current data files on eligible firms and responses to a public notice concerning the particular project (see 36.604).

(b) Evaluate the firms in accordance with the criteria in 36.602-1.

(c) Hold discussions with at least three of the most highly qualified firms regarding concepts and the relative utility of alternative methods of furnishing the required services, when the prospective architect-engineer contract is estimated to exceed $10,000. Architect-engineer fees shall not be considered in these discussions.

(d) Prepare a selection report for the agency head or other designated selection authority recommending, in order of preference, at least three firms that are considered to be the most highly qualified to perform the required services. The report shall include a description of the discussions and evaluation conducted by the board to allow the selection authority to review the considerations upon which the recommendations are based.

36.602-4 Selection authority.

(a) The final selection decision shall be made by the agency head or a designated selection authority.

(b) The selection authority shall review the recommendations of the evaluation board and shall, with the advice of appropriate technical and staff representatives, make the final selection. This final selection shall be a listing, in order of preference, of the firms considered most highly qualified to perform the work. If the firm listed as the most preferred is not the firm recommended as the most highly qualified by the evaluation board, the selection authority shall provide for the contract file a written explanation of the reason for the preference. All firms on the final selection list are considered "selected firms" with which the contracting officer may negotiate in accordance with 36.606.

(c) The selection authority shall not add firms to the selection report. If the firms recommended in the report are not deemed to be qualified or the report is considered inadequate for any reason, the selection authority shall record the reasons and return the report through channels to the evaluation board for appropriate revision.

(d) The board shall be promptly informed of the final selection.

36.602-5 Short selection processes for contracts not to exceed $10,000.

When authorized by the agency, either or both of the short processes described in this subsection may be used to select firms for contracts not expected to exceed $10,000. Otherwise, the procedures prescribed in 36.602-3 and 36.602-4 shall be followed.

(a) *Selection by the board.* The board shall review and evaluate architect-engineer firms in accordance with 36.602-3, except that the selection report shall serve as the final selection list and shall be provided directly to the contracting officer. The report shall serve as an authorization for the contracting officer to commence negotiations in accordance with 36.606.

(b) *Selection by the chairperson of the board.* When the board decides that formal action by the board is not necessary in connection with a particular selection, the following procedures shall be followed:

(1) The chairperson of the board shall perform the functions required in 36.602-3.

(2) The agency head or designated selection authority shall review the report and approve it or return it to the chairperson for appropriate revision.

(3) Upon receipt of an approved report, the chairperson of the board shall furnish the contracting officer a copy of the report which will serve as an authorization for the contracting officer to commence negotiations in accordance with 36.606.

36.603 Collecting data on and appraising firms' qualifications.

(a) *Establishing offices.* Agencies shall maintain offices or permanent evaluation boards, or arrange to use the offices or boards of other agencies, to receive and maintain data on firms wishing to be considered for Government contracts. Each office or board shall be assigned a jurisdiction by its parent agency, making it responsible for a geographical region or area, or a specialized type of construction.

(b) *Qualifications data.* To be considered for architect-engineer contracts, a firm must file with the appropriate office or board the Standard Form 254 (SF 254), "Architect-Engineer and Related Services Questionnaire," and when applicable, the Standard Form 255 (SF 255), "Architect-Engineer and Related Services Questionnaire for Specific Project."

(c) *Data files and the classification of firms.* Under the direction of the parent agency, offices or permanent evaluation boards shall maintain an architect-engineer qualifications data file. These offices or boards shall review the SF's 254 and 255 filed, and shall classify each firm with respect to:

(1) Location;

(2) Specialized experience;

(3) Professional capabilities; and

(4) Capacity, with respect to the scope of work that can be undertaken. A firm's ability and experience in computer-assisted design should be considered, when appropriate.

(d) *Currency of files.* Any office or board maintaining qualifications data files shall review and update each file at least once a year. This process should include:

(1) Encouraging firms to submit annually an updated statement of qualifications and performance data on a SF 254.

(2) Reviewing the SF's 254 and 255 and, if necessary, updating the firm's classification (see 36.603(c)).

(3) Recording any contract awards made to the firm in the past year.

(4) Assuring that the file contains a copy of each pertinent performance report (see 36.604).

(5) Discarding any material that has not been updated within the past three years, if it is no longer pertinent, see 36.604(c).

(6) Posting the date of the review in the file.

(e) *Use of data files.* Evaluation boards and other appropriate Government employees, including contracting officers, shall use data files on firms.

36.604 Performance evaluation.

(a) *Preparation of performance reports.* (1) For each contract of more than $25,000, a performance evaluation report shall be prepared by the cognizant contracting activity, using the SF 1421, Performance Evaluation (Architect-Engineer). Performance evaluation reports may also be prepared for contracts of $25,000 or less.

(2) The report shall be prepared after final acceptance of the work or after contract termination, as appropriate. Ordinarily, the evaluating official who prepares the report should be the person responsible for monitoring contract performance.

(3) If the evaluating official concludes that a contractor's overall performance was unsatisfactory, the contractor shall be advised in writing that a report of unsatisfactory performance is being prepared and the basis for the report. If the contractor submits any written comments, the evaluating official shall include them in the report, resolve any alleged factual discrepancies, and make appropriate changes in the report.

(4) The head of the contracting activity shall establish procedures which ensure that fully qualified personnel prepare and review performance reports.

(b) *Review of performance reports.* Each performance report shall be reviewed to ensure that it is accurate and fair. The reviewing official should have knowledge of the contractor's performance and should normally be at an organizational level above that of the evaluating official.

(c) *Distribution and use of performance reports.* Each performance report shall be distributed in accordance with agency procedures. The report shall be included in the contract file, and copies shall be sent to offices or boards for filing with the firm's qualifications data (see 36.603(d)(4)). The contracting activity shall retain the report for at least six years after the date of the report.

36.605 Government cost estimate for architect-engineer work.

(a) An independent Government estimate of the cost of architect-engineer services shall be prepared and furnished to the contracting officer before commencing negotiations for each proposed contract or contract modification expected to exceed $25,000. The estimate shall be prepared on the basis of a detailed analysis of the required work as though the Government were submitting a proposal.

(b) Access to information concerning the Government estimate shall be limited to Government personnel whose official duties require knowledge of the estimate. An exception to this rule may be made during contract negotiations to allow the contracting officer to identify a specialized task and disclose the associated cost breakdown figures in the Government estimate, but only to the extent deemed necessary to arrive at a fair and reasonable price. The overall amount of the Government's estimate shall not be disclosed except as permitted by agency regulations.

36.606 Negotiations.

(a) Unless otherwise specified by the selection authority, the final selection authorizes the contracting officer to begin negotiations. Negotiations shall be conducted in accordance with Part 15 of this regulation, beginning with the most preferred firm in the final selection (see 15.903(d)(1)(ii) on fee limitation).

(b) The contracting officer should ordinarily request a proposal from the firm, ensuring that the solicitation does not inadvertently preclude the firm from proposing the use of modern design methods.

(c) The contracting officer shall inform the firm that no construction contract may be awarded to the firm that designed the project, except as provided in 36.209.

(d) During negotiations, the contracting officer should seek advance agreement (see 31.109) on any charges for computer-assisted design. When the firm's proposal does not cover appropriate modern and cost-effective design methods (e.g., computer-assisted design), the contracting officer should discuss this topic with the firm.

(e) Because selection of firms is based upon qualifications, the extent of any subcontracting is an important negotiation topic. The clause prescribed at 44.204(d), "Subcontractors and Outside Associates and Consultants" (see 52.244-4), limits a firm's subcontracting to firms agreed upon during negotiations.

(f) If a mutually satisfactory contract cannot be negotiated, the contracting officer shall obtain a written best and final offer from the firm, and notify the firm that negotiations have been terminated. The contracting officer shall then initiate negotiations with the next firm on the final selection list. This procedure shall be continued until a mutually satisfactory contract has been negotiated. If negotiations fail with all selected firms, the contracting officer shall refer the matter to the selection authority who, after consulting with the contracting officer as to why a contract cannot be negotiated, may direct the evaluation board to recommend additional firms in accordance with 36.602.

36.607 Release of information on firm selection.

After final selection has taken place, the contracting officer may release information identifying only the architect-engineer firm with which a contract will be negotiated for certain work. The work should be described in any release only in general terms, unless information relating to the work is classified. If negotiations are terminated without awarding a contract to the highest rated firm, the contracting officer may release that information and state that negotiations will be undertaken with another (named) architect-engineer firm. When an award has been made, the contracting officer may release award information, (see 5.401).

36.608 Liability for Government costs resulting from design errors or deficiencies.

Architect-engineer contractors shall be responsible for the professional quality, technical accuracy, and coordination of all services required under their contracts. A firm may be liable for Government costs resulting from errors or deficiencies in designs furnished under its contract. Therefore, when a modification to a construction contract is required because of an error or deficiency in the services provided under an architect-engineer contract, the contracting officer (with the advice of technical personnel and legal counsel) shall consider the extent to which the architect-engineer contractor may be reasonably liable. The contracting officer shall enforce the liability and collect the amount due, if the recoverable cost will exceed the administrative cost involved or is otherwise in the Government's interest. The contracting officer shall include in the contract file a written statement of the reasons for the decision to recover or not to recover the costs from the firm.

36.609 Contract clauses.

36.609-1 Design within funding limitations.

(a) The Government may require the architect-engineer contractor to design the project so that construction costs will not exceed a contractually specified dollar limit (funding limitation). If the price of construction proposed in response to a Government solicitation exceeds the construction funding limitation in the architect-engineer contract, the firm shall be solely responsible for redesigning the project within the funding limitation. These additional services shall be performed at no increase in the price of this contract. However, if the cost of proposed construction is affected by events beyond the firm's reasonable control (e.g., if there is an increase in material costs which could not have been anticipated, or an undue delay by the Government in issuing a construction solicitation), the firm shall not be obligated to redesign at no cost to the Government. If a firm's design fails to meet the contractual limitation on construction cost and the Government determines that the firm should not redesign the project, a written statement of the reasons for that determination shall be placed in the contract file.

(b) The amount of the construction funding limitation (to be inserted in paragraph (c) of the clause at 52.236-22) is to be established during negotiations between the contractor and the Government. This estimated construction contract price shall take into account any statutory or other limitations and exclude any allowances for Government supervision and overhead and any amounts set aside by the Government for contingencies. In negotiating the amount, the contracting officer should make available to the contractor the information upon which the Government has based its initial construction estimate and any subsequently acquired information that may affect the construction costs.

(c) The contracting officer shall insert the clause at 52.236-22, Design Within Funding Limitations, in architect-engineer contracts except when (1) the head of the contracting activity or a designee determines in writing that cost limitations are secondary to performance considerations and additional project funding can be expected, if necessary, (2) the design is for a standard structure and is not intended for a specific location, or (3) there is little or no design effort involved.

36.609-2 Redesign responsibility for design errors or deficiencies.

(a) Under architect-engineer contracts, contractors shall be required to make necessary corrections at no cost to the Government when the designs, drawings, specifications, or other items or services furnished contain any errors, deficiencies, or inadequacies. If, in a given situation, the Government does not require a firm to correct such errors, the contracting officer shall include a written statement of the reasons for that decision in the contract file.

(b) The contracting officer shall insert the clause at 52.236-23, Responsibility of the Architect-Engineer Contractor, in architect-engineer contracts.

36.609-3 Work oversight in architect-engineer contracts.

The contracting officer shall insert the clause at 52.236-24, Work Oversight in Architect-Engineer Contracts, in architect-engineer contracts.

36.609-4 Requirements for registration of designers.

The contracting officer shall insert the clause at 52.236-25, Requirements for Registration of Designers, in fixed-price architect-engineer contracts, except that it may be omitted from a contract when the design is to be performed (a) outside the United States, its possessions, or Puerto Rico, or (b) in a State or possession that does not have registration requirements for the particular field involved.

SUBPART 36.7—STANDARD FORMS FOR CONTRACTING FOR CONSTRUCTION, ARCHITECT-ENGINEER SERVICES, AND DISMANTLING, DEMOLITION, OR REMOVAL OF IMPROVEMENTS

36.700 Scope of subpart.

This subpart sets forth requirements for the use of standard forms, prescribed in Part 53, for contracting for construction, architect-engineer services, or dismantling, demolition, or removal of improvements. These standard forms are illustrated in Part 53.

41 CFR.

§ 3-4.6008 Procurement of construction and architect-engineering services contract.

(a) This section sets forth procedures and requirements peculiar to construction and architect-engineering service contracts. The terms and conditions of such contracts when negotiated with an Indian tribe or tribal organization pursuant to the Act shall, to the extent applicable, be in accordance with the requirements set forth in Part 1-18 and Part 1-4.10 of this title. However, if there is a conflict between Part 1-18 and Part 1-4.10 of this title, and any provision of the Act or 42 CFR Part 36, the Act or 42 CFR Part 36 shall govern. In addition, such contracts shall include the special provisions identified in § 3-4.6011.

(b) Exceptions.

(1) Subpart 1-18.10 of this title is not applicable.

(2) The contract clauses required by § 1-18.703-1 of this title shall be inserted in construction contracts with an Indian tribe or tribal organization which serves as a governmental instrumentality of an Indian tribe, but shall be prefaced by the provision contained in § 1-18.702-3 of this title.

(3) In all cases, the contracting officer shall obtain and insert the Wage Determination Decision issued by the Secretary of Labor in the contract prior to award of any contract for construction that falls within the purview of the Davis-Bacon Act. The Wage Determination Decision should be furnished sufficiently in advance of the contract award date to permit full consideration by the tribal organization and any prospective subcontractors prior to contract award.

[42 FR 39215, Aug. 3, 1977; 42 FR 41636, Aug. 18, 1977]

Subpart 1-4.10—Architect-Engineer Services

SOURCE: 38 FR 33594, Dec. 6, 1973, unless otherwise noted.

§ 1-4.1000 Scope of subpart.

This subpart contains the general policies and procedures for the procurement of professional architect-engineer services, either individually or together, by contract.

§ 1-4.1001 General policy.

Pursuant to Pub. L. 92-582 dated October 27, 1972, which amended the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471, et seq.), it is the policy of the Federal Government to publicly announce all requirements for architect-engineer services, and to negotiate contracts for architect-engineer services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

§ 1-4.1002 Definitions.

(a) "Firm" means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

(b) "Agency head" means the Secretary, Administrator, or head of a department, agency, or bureau of the Federal Government.

(c) "Architect-engineer services" are those professional services associated with research, development, design and construction, alteration, or repair of real property, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform: Including studies, investigations, surveys, evaluations, consultations, planning, programing, conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals, and other related services.

§ 1-4.1003 Public announcements.

To ensure the broadest publicity concerning the Government's interest in obtaining architect-engineer services, each agency head shall develop notices in accordance with § 1-1.1003 with respect to individual projects.

§ 1-4.1004 Selection.

§ 1-4.1004-1 Establishment of architect-engineer evaluation boards.

(a) Each agency head shall establish one or more permanent or ad hoc architect-engineer evaluation boards to be composed of an appropriate number of members who, collectively, have experience in architecture, engineering, construction, and related procurement matters. Members shall be appointed from among highly qualified professional employees (intra-agency and interagency) and private practitioners (if provided for by agency procedures) engaged in the practice of architecture, engineering or related professions. One Government member of each board shall be designated as the chairman.

(b) No firm or organization shall be eligible for consideration for a contract during the period in which any of its principals or associates are participating as members of the procuring agency's evaluation board.

[38 FR 33594, Dec. 6, 1973, as amended at 40 FR 30440, July 18, 1975]

§ 1-4.1004-2 Functions of the evaluation boards.

Under the general authority of the agency head's technical staff, the agency architect-engineer evaluation boards shall perform the functions prescribed by this section.

(a) Collect and maintain current data files on architect-engineer firms, including information on the qualifications of their members and key employees and past experience on various types of construction projects. Standard Form 254, Architect-Engineer and Related Services Questionnaire, as supplemented (when applicable) by Standard Form 255, Architect-Engineer and Related Services Questionnaire for Specific Project shall be used for this purpose. Information from other sources (such as other clients, other members of the profession, managers or occupants of facilities previously designed, and assessments by the procuring agency itself on prior projects awarded to a firm) may also be included in the files.

(b) When procurement of architect-engineer services is proposed, the board shall review the current data files on eligible firms, including files established on receipt of Standard Form 254 and Standard Form 255, when applicable, in response to the public notice of a particular contract. The board shall evaluate the firms in accordance with § 1-4.1004-3. After making this review and technical evaluation, the board shall hold discussions with not less than three of the most highly qualified firms regarding anticipated concepts and relative utility of alternative methods of approach for furnishing the required services. Architect-engineer fees shall not be considered in these discussions.

(c) Prepare a report for submission to the agency head or his authorized representative recommending, in the order of preference, no less than three firms that are considered most highly qualified to perform the required services. This report shall include in sufficient detail the extent of the evaluation and review and the considerations upon which the recommendations were based.

[40 FR 30440, July 18, 1975]

§ 1-4.1004-3 Evaluation criteria.

In evaluating architect-engineer firms, the architect-engineer evaluation board shall apply the following criteria, other criteria established by agency regulation, and any criteria set forth in the public notice on a particular contract:

(a) Specialized experience and technical competence of the firm (including a joint venture or association) with the type of service required;

(b) Capacity of the firm to perform the work (including any specialized services) within the time limitations;

(c) Past record of performance on contracts with Government agencies and private industry with respect to such factors as control of costs, quality of work, and ability to meet schedules; and

(d) Familiarity with the area in which the project is located.

§ 1-4.1004-4 Action by agency head or his authorized representative.

(a) The agency head (or the responsible official to whom the authority has been delegated) shall review the recommendations of the architect-engineer evaluation board and shall, in concert with appropriate technical and staff representatives, make the final selection, in the order of preference, of the firms considered best qualified to perform the work. Should that final selection of the best qualified firms be other than as recommended by the architect-engineer evaluation board, the agency head shall provide a complete written documentation of his decision which shall become a part of the contract file.

(b) The agency head or his authorized representative shall inform the board of his decision which will serve as an authorization for the contracting officer to commence negotiation.

[38 FR 33594, Dec. 6, 1973, as amended at 40 FR 30440, July 18, 1975]

§ 1-4.1004-5 Procedures for procurements estimated not to exceed $10,000.

When authorized by the agency head, one of the procedures set forth in paragraphs (a) and (b) of this section may be used in lieu of the procedures prescribed by § 1-4.1004-2(b) and (c) and actions prescribed by § 1-4.1004-4.

(a) *Selection by the board.* After reviewing and evaluating architect-engineer firms in accordance with § 1-4.1004-2(b), the board shall prepare a report for submission to the contracting officer listing in the order of preference, a minimum of three firms which are considered the most highly qualified to perform the required services. This report shall include sufficient details of the extent of the evaluation and review made and the considerations upon which the selection is based. Further, the report shall serve as an authorization to the contracting officer to commence negotiation with the highest qualified firm.

(b) *Selection by the chairman of the board.* When, in the judgment of the board, it is considered that board action is not required in connection with a particular selection of architect-engineer firms, the following procedures shall be followed:

(1) The chairman of the board shall perform the functions required under § 1-4.1004-2(b);

(2) The chairman of the board shall prepare a report in the same manner as prescribed by § 1-4.1004-2(c) except that the report shall be submitted to the agency head's representative for concurrence;

(3) The agency head's representative shall review the report and concur with the selection or return the report to the chairman for such action as he may consider necessary; and

(4) Upon receipt of an approved report, the chairman of the board shall furnish the contracting officer a copy of the report which will serve as an authorization to commence negotiation.

§ 1-4.1005 Negotiation procedures.

§ 1-4.1005-1 General.

(a) Each agency head is responsible for negotiation of contracts for architect-engineer services. This responsibility may be delegated to a contracting officer. The contracting officer shall use the services of technical, legal, auditing, pricing, and other specialists in the agency to the extent deemed appropriate (see §§ 1-3.801-2 and 1-3.801-3). Negotiations shall be directed toward:

(1) Making certain that the architect-engineer has a clear understanding of the essential requirements;

(2) Determining that the architect-engineer will make available the necessary personnel and facilities to accomplish the work within the required time;

(3) Determining, where applicable, whether the architect-engineer can provide a design that will permit construction of the facility at a construction cost not to exceed the limit established for the project; and

(4) Reaching mutual agreement on the provisions of the contract, including a fair and reasonable price for the required work.

(b) The amount of the fee (price) that may be paid to an architect-engineer firm under a cost-reimbursement contract for the production and delivery of the designs, plans, drawings, and specifications may not exceed 6 percent of the estimated construction cost of the project, exclusive of the amount of the fee (see 41 U.S.C. 254). The statutory limitation shall apply also to the fee paid to an architect-engineer for the performance of such services under a fixed-price contract. This limitation shall be applied on an individual project basis.

§ 1-4.1005-2 Conduct of negotiations.

Negotiations shall be conducted initially with the architect-engineer firm given first preference under the procedures set forth in § 1-4.1004. If a mutually satisfactory contract cannot be negotiated with that firm, the contracting officer shall obtain a best and final offer, in writing, from the contractor, and with the assistance of his technical staff formally terminate the negotiation and notify the firm. Negotiations then shall be initiated with the subsequently listed firm in the order of preference and this procedure shall be continued until a mutually satisfactory contract has been negotiated. If negotiations fail with the listed firms, additional firms shall be selected in accordance with § 1-4.1004 and negotiations shall continue in the manner described above.

§ 1-4.1005-3 Independent Government estimate.

Prior to the initiation of negotiations, the procurement agency shall develop an independent Government estimate of the cost of the required architect-engineer services based on a detailed analysis of the costs expected to be generated by the work. Consideration shall be given to the estimated value of the services to be rendered, the scope, complexity, and the nature of the project. The independent Government estimate shall be revised as required during negotiations to reflect changes in or clarification of the scope of the work to be performed by the architect-engineer. On construction projects, a fee estimate based on the application of percentage factors to project cost estimates of the various segments of the work involved may be developed for comparison purposes, but such a cost estimate shall not be used as a substitute for the independent Government estimate.

§ 1-4.1005-4 Architect-engineer's proposal.

The contracting officer shall request the selected architect-engineer firm to submit its proposal with supporting cost or pricing data in accordance with §§ 1-3.807-3 and 1-3.807-4. Revisions of the proposal and supporting cost or pricing data may be made as required during negotiations to reflect changes in or clarification of the scope of the work to be performed by the architect-engineer or findings derived from preaward audits conducted pursuant to § 1-3.809.

§ 1-4.1005-5 Contract price.

Subject to the provisions of § 1-4.1005-1(b), the contracting officer shall negotiate a price considered fair and reasonable based on a comparative study of the independent Government estimate and the architect-engineer's proposal. Significant differences between elements of the two figures and between the overall figures shall be discussed and the contracting officer shall ascertain the reasons therefor.

§ 1-4.1005-6 Record of negotiation.

Promptly at the conclusion of each negotiation, a memorandum setting forth the principal elements of the negotiations shall be prepared in accordance with the requirements of § 1-3.811, for use by the reviewing authorities and for inclusion in the contract file. The memorandum shall contain sufficient detail to reflect the significant considerations controlling the establishment of the price and other terms of the contract.

§ 1-4.1006 Limitation on contracting with architect-engineer firms for construction work.

§ 1-4.1006-1 Policy.

The award of a contract for architect-engineer services for a particular project and the award of a contract for the related construction work to the same firm, a parent firm, or its subsidiaries or affiliates is prohibited except as otherwise provided by § 1-18.112.

§ 1-4.1006-2 Procedure.

An architect-engineer firm selected for negotiation of an architect-engineer services contract shall be informed of the policy set forth in § 1-4.1006-1 prior to the initiation of negotiations. If the firm possesses construction capabilities either within its own organization or through a parent firm, subsidiaries or affiliates, the firm shall have the option of either:

(a) Declining to enter into contract negotiations so that its parent firm, subsidiaries, or affiliates will be eligible to compete for the related construction contract; or

(b) Entering into contract negotiations with the clear understanding that, if such negotiations are successful, its parent firm, subsidiaries, or affiliates will be ineligible to compete for the related construction contract.

§ 1-4.1007 Small business.

The policy of the Government that a fair proportion of contracts for services be awarded to small businesses is applicable without qualification to the award of contracts for architect-engineer services. In complying with this requirement, the provisions of Subpart 1-1.7 shall be followed.

Subpart 1-4.11—Procurement and Contracting Government-Wide for Automatic Data Processing Equipment, Software, Maintenance Services, and Supplies

SOURCE: 46 FR 1197, Jan. 5, 1981, unless otherwise noted.

§ 1-4.1100 Scope of subpart.[1]

This subpart sets forth policies and procedures which are to be employed under the authority of the act and this order shall be assigned except in accordance with the Assignment of Claims Act of 1940 (54 Stat. 1029), as amended.

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[1] See Temporary Regulation 71 in the appendix to Chapter 1 for temporary changes to § 1-4.1100.

9. Advance payments shall be made hereunder only upon obtaining adequate security.

10. Every contract entered into, amended, or modified pursuant to this order shall contain a warranty by the contractor in substantially the following terms:

"The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except bona-fide employees or bona-fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee."

11. All contracts entered into, amended, or modified pursuant to authority of this order shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment, have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of, and involving transactions related to, such contracts or subcontracts.

12. Nothing herein contained shall be construed to constitute authorization hereunder for—

(a) the use of the cost-plus-a-percentage-of-cost system of contracting;

(b) any contract in violation of existing law relating to limitation of profits or fees;

(c) the negotiation of purchases of or contracts for property or services required by law to be procured by formal advertising and competitive bidding;

(d) the waiver of any bid, payment, performance, or other bond required by law;

(e) the amendment of a contract negotiated under section 2304(a)(15) of title 10 of the United States Code to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder; or

(f) the formalization of an informal commitment, unless the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, or the duly authorized representative of any such Secretary, finds that at the time the commitment was made it was impracticable to use normal procurement procedures.

13. The provisions of the Walsh-Healey Act (49 Stat. 2036), as amended, the Davis-Bacon Act (49 Stat. 1011), as amended, the Copeland Act (48 Stat. 948), as amended, and the Eight Hour Law (37 Stat. 137), as amended, if otherwise applicable, shall apply to contracts made and performed under the authority of this order.

14. Nothing herein contained shall prejudice anything heretofore done under Executive Order No. 9001 of December 27, 1941, or Executive Order No. 10210 of February 2, 1951, or any amendments or extensions thereof, or the continuance in force of any action heretofore taken under those orders or any amendments or extensions thereof.

15. Nothing herein contained shall prejudice any other authority which the Department of Defense may have to enter into, amend, or modify contracts, and to make advance payments.

PART II—EXTENSION OF PROVISIONS OF PARAGRAPHS 1-14

21. Subject to the limitations and regulations contained in paragraphs 1 to 14, inclusive, hereof, and under any regulations prescribed by him in pursuance of the provisions of paragraph 22 hereof, the head of each of the following-named agencies[1] is authorized to perform or exercise as to his agency, independently of any Secretary referred to in the said paragraphs 1 to 14, all the functions and authority vested by those paragraphs in the Secretaries mentioned therein:

Department of the Treasury.
Department of the Interior.
Department of Agriculture.
Department of Commerce.
Atomic Energy Commission.
General Services Administration.
National Aeronautics and Space Administration.
Federal Aviation Agency.
Tennessee Valley Authority.
Government Printing Office.

22. The head of each agency named in paragraph 21 hereof is authorized to prescribe regulations governing the carrying out of the functions and authority vested with respect to his agency by the provisions of paragraph 21 hereof. Such regulations shall, to the extent practicable, be uniform with the regulations prescribed or approved by the Secretary of Defense under the provisions of Part I of this order.

23. Nothing contained herein shall prejudice any other authority which any agency named in paragraph 21 hereof may have to enter into, amend, or modify contracts and to make advance payments.

24. Nothing contained in this Part shall constitute authorization thereunder for the amendment of a contract negotiated under section 302(c)(14) of the Federal Property and Administrative Services Act of 1949 (63 Stat. 394), as amended by section 2(b) of the act of August 28, 1958, 72 Stat. 966, to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder.

Dwight D. Eisenhower

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[1] Executive Order No. 11051 of September 27, 1962, deleted the Office of Civil and Defense Mobilization.

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1-18.803-6 Dealings with surety-takeover agreements.
1-18.803-7 Completion by another contractor.
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Subpart 1-18.9—[Reserved]

Subpart 1-18.10—Bonds and Insurance

1-18.1000 Scope.
1-18.1001 Bid guarantees.
1-18.1002 Performance bonds in connection with construction contracts.
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1-18.1004 Furnishing information to subcontractors and suppliers.
1-18.1005 Default procedures.
1-18.1006 Consent of surety.
1-18.1007 Insurance.

Subpart 1-18.11—Federal, State, and Local Taxes

1-18.1101 Cross-reference.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

SOURCE: 33 FR 14288, Sept. 21, 1968, unless otherwise noted.

§ 1-18.000 Scope of part.

This part sets forth contracting procedures peculiar to construction contracts. Other provisions of the Federal Procurement Regulations are also applicable to construction contracts and shall be adhered to where applicable. All contracts mentioned in this part shall be deemed to mean construction contracts unless specifically described otherwise. Where a contract covers the procurement of both construction and supplies or services, the contract shall include provisions applicable to the predominant part of the work, or shall be divided into parts, and include the provisions appropriate for each part, but see § 1-12.402-2. Where a provision in this part is inconsistent with a provision elsewhere in the Federal Procurement Regulations, the provision of this part shall apply to construction.

Subpart 1-18.1—General Provisions

§ 1-18.101 Definitions.

See also Subpart 1-1.2.

§ 1-18.101-1 Construction.

"Construction" as used in this part means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. For purposes of this definition, the terms "buildings, structures, or other real property" include but are not limited to buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, powerlines, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels. Construction does not include exploratory drilling and other investigative work which is for the purpose of obtaining preliminary data to be used in engineering studies and which is not a part of commencing or continuing the construction process, nor does it include the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property.

§ 1-18.102 Methods of procurement.

§ 1-18.102-1 General.

Construction shall be procured by means of formal advertising whenever such method is feasible and practicable under the existing circumstances. Permissible exceptions include small business set-asides, overseas construction, and construction of a classified or experimental nature, as provided in Part 1-3 (see also §§ 1-18.200 and 1-18.301-2).

§ 1-18.103 Sources of construction services.

Generally, construction in the United States shall be performed by contract between the Government and such person or firm as shall be selected in accordance with the procedures of the procuring agency. However, construction may be performed by agency personnel where the circumstances dictate.

§ 1-18.104 Subcontracting.

Specialty items, such as plumbing, heating, and electrical work, are usually subcontracted. Therefore, unless the contractor is required to perform a significant part of the contract work with his own forces, there may be difficulty in obtaining adequate supervision by him. To avoid this difficulty, a construction contract may contain the following clause with the insertions of the maximum percentage consistent with customary or necessary specialty subcontracting, and the complexity and magnitude of the work:

PERFORMANCE OF WORK BY CONTRACTOR

The Contractor shall perform on the site, and with his own organization, work equivalent to at least (words) percent [1] (figures) of the total amount of work to be performed under the contract. If, during the progress of the work hereunder, the Contractor requests a reduction in such percentage, and the Contracting Officer determines that it would be to the advantage of the Government, the percentage of the work required to be performed by the Contractor may be reduced with the written approval of the Contracting Officer.

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[1] The required percentage should ordinarily not be less than 12 percent.

§ 1-18.105 Time of performance.

(a) In establishing the time for completion of a contract, the contracting officer should give consideration, among other things, to:

(1) The nature and complexity of the project;

(2) The construction seasons involved;

(3) The requirements of the Government; and

(4) The availability of materials and equipment.

(b) In any given contract, separate completion periods may be established for separable items of work. Where such periods are shown, requests for extension of time must be evaluated with respect to each item, and the affected completion periods modified where appropriate.

§ 1-18.106 Minimum standards for responsible prospective contractors.

In evaluating the responsibility of a prospective contractor, the contracting officer shall consider whether a bid bond has been furnished and performance and payment bonds are to be furnished. Prior to underwriting bid, performance, and payment bonds, it is normal practice for each surety company to conduct a prequalification survey which examines, verifies, and evaluates the contractor's financial resources, technical expertise for the type of work involved, management and organization ability, current workload, and capability to complete the contract in the required time. Normally, the contracting officer is not expected to duplicate this effort in conducting the preaward survey, but should emphasize in addition thereto the evaluation of information which is uniquely available to the Government, such as the Joint Consolidated List of Debarred, Ineligible, and Suspended Contractors (see § 1-1.602 *et seq.*), contractor experience lists, and performance evaluations on present or previous contracts with the Government. More extensive preaward surveys should be conducted when the project requires unique or unusual construction expertise or when information available to the contracting officer indicates that the contractor may not be responsible (see § 1-1.1203, Minimum standards for responsible prospective contractors, for other pertinent factors). The responsibility for determining the extent to which a preaward survey is appropriate to the circumstances rests with the contracting officer. Where the prospective contractor is a joint venture, the sum of its financial resources and the individual capacities of all its members will be used in determining the responsibility of the joint venture.

[42 FR 56740, Oct. 28, 1977]

§ 1-18.107 Specifications.

(a) The technical provisions of construction specifications shall be in sufficient detail so that, when used with the applicable drawings, bids can be prepared by contractors, material suppliers, and manufacturers on a fair and competitive basis, and construction can be completed without additional construction specifications, except those necessary to deal with unforeseen conditions or to accomplish changes during construction. Materials and equipment shall be described, where possible, by reference to documents generally known to the industry. The use of specifications and standards shall be governed by §§ 1-1.305 and 1-1.306.

(b) When it is necessary to use "brand name or equal" descriptions in the specifications for descriptive purposes, the particular physical, functional, or other characteristics of the brand name item which are deemed essential to the needs of the procuring agency shall be clearly identified and described.

§ 1-18.108 Government estimates.

An independent Government estimate of construction cost in as much detail as in the case of a prospective contractor's bid shall be prepared for each proposed contract and, at the earliest practicable time, for each modification of an existing contract affecting price, anticipated to cost (in either instance) $10,000 or more. Where the anticipated cost is less than $10,000, the contracting officer, at his discretion, may require the preparation of an estimate. Except as may be permitted by agency regulations,

access to, or disclosure of, information concerning the Government estimate shall be limited to Government personnel whose official duties require knowledge of the estimate.

§ 1-18.109 Disclosure of size of construction projects.

Where the estimated value of the work is $25,000 or more, advance notices or invitations for bids and requests for proposals shall include a statement of the magnitude in terms of physical characteristics of the proposed construction and by reference to the estimated price range (e.g. $500,000-$1,000,000). In no event shall such statement disclose the Government estimate.

§ 1-18.110 Liquidated damages.

(a) A liquidated damages clause may, in the discretion of the contracting officer, be included in construction contracts. See § 1-1.315. Where such a provision is used, the invitation for bids or request for proposals shall include a clause reading substantially as follows:

LIQUIDATED DAMAGES

In case of failure on the part of the Contractor to complete the work within the time fixed in the contract or any extensions thereof, the Contractor shall pay to the Government as fixed, agreed and liquidated damages, pursuant to the clause of this contract entitled "Termination for Default-Damages for Delay-Time Extensions", the sum of $—— for each calendar day of delay.

(b) Where different completion periods for separate parts or stages of the work are specified in the contract, this clause should be revised appropriately to provide for liquidated damages for delay in completion of each separate part or stage of the work as to which delay in completion will result in damage to the Government.

(c) The minimum amount of liquidated damages should be based on the estimated cost of inspection and superintendence for each day of delay in completion. Whenever the Government will suffer other specific losses due to the failure of the contractor to complete the work on time, such as the cost of substitute facilities, the rental of buildings, or the continued payment of quarters allowances, an amount for such items should also be included.

(d) Contracting officers shall take all reasonable steps to mitigate liquidated damages. With respect to remissions of such damages, see § 1-1.315-2(e).

§ 1-18.111 Concurrent firm fixed-price and cost-type construction contracts.

In view of potential labor and administrative problems, cost-plus-a-fixed-fee, price-incentive, or other types of contracts with cost variation or cost adjustment features will not be permitted concurrently, with the same contractor and at the same work site, with firm fixed-price, lump sum, or unit price contracts except with the prior approval of the head of the procuring agency, or his authorized designee.

§ 1-18.112 Construction contracts with design architect-engineers.

No contract for construction of a project shall be awarded to a firm or person that designed the project, except with the approval of the head of the procuring agency, or his authorized designee.

§ 1-18.113 Architect-engineer services contracts.

Policies and procedures applicable to architect-engineer services contracts are set forth in Subpart 1-4.10 of this title 41.

[38 FR 33596, Dec. 6, 1973]

§§ 1-18.114—1-18.116 [Reserved]

§ 1-18.117 Administration of the differing site conditions clause.

(a) *Nature of the clause.* The Differing Site Conditions clause in § 1-7.602-4 provides for an equitable adjustment to the contractor or the Government which reflects the increases or decreases in a contractor's cost of and time for performance that result from a differing site condition (as that term is defined in the clause) encountered by the contractor. However, an equitable adjustment is only available to the contractor if he gives the contracting officer a prompt notice in writing before disturbing the conditions (or secures an extension of the time for giving such notice) and asserts the claim before final payment under the contract.

(b) *Notice of differing site conditions.* When a contractor believes that a differing site condition has been encountered, the clause requires that a prompt written notice be given to the contracting officer so that the condition of the site can be investigated, the facts can be ascertained, and a determination can be made regarding the presence or absence of a differing site condition. The prompt notice requirement enables the Government to examine the condition of the site and, if necessary, (1) To modify the contract so that it will reflect the increased or decreased cost of and time for performance or (2) to develop records concerning any increase or decrease in the cost of and time for performance. Cost and time information is essential for an independent Government judgment regarding an equitable adjustment of the contract. A failure to give a timely notice could seriously prejudice the Government's ability to determine the extent to which the contractor or the Government is entitled to an equitable adjustment. Since the existence of a differing site condition is not always recognizable immediately, the clause provides that the contracting officer may extend the time for the submission of the required notice. The purpose of the authority to extend the time for the notice is to ensure that contractors are not deprived of the remedy provided by the clause because of an inadvertent failure to give the required notice. However, this authority to extend the time for the notice does not entitle a contractor to a time extension beyond the time when he knew, or reasonably should have known, of the existence of a differing site condition. If the contractor gives the required notice at the time he knew, or reasonably should have known, of the existence of the differing site condition, he is entitled to an equitable adjustment which reflects the increased costs and time required for performance that result from the differing site condition. If the contractor fails to submit the required notice to the contracting officer by the time he knew, or reasonably should have known, of the existence of a differing site condition, he is not entitled to an equitable adjustment which reflects the increased costs and time required for performance prior to the time when he gave the notice or the time when the Government had actual notice of the existence of a differing site condition.

(c) *Processing of claims.* (1) Since the time required by the contractor to ascertain the amount of his claim varies with the circumstances, no specific time for the submission of a claim is specified in the clause or in this section. The clause simply states that no claim will be allowed if asserted after final payment. However, contractors should not unnecessarily postpone the submission of claims for equitable adjustments.

(2) To prevent contractors from unnecessarily postponing the submission of claims, contracting officers shall take the following actions.

(i) When a contractor gives a prompt written notice of a differing site condition but has not submitted a claim for an equitable adjustment, although there has been a reasonable opportunity to ascertain the amount of the adjustment involved, the contracting officer shall send a written request to the contractor (by registered or certified mail) that he submit within a specified period of time either a written claim or a request for an extension of the time for submission of the claim together with the reasons why the additional time is needed.

(ii) In the event that the contractor fails to submit a claim within the time specified in the request, or an approved time extension, the contracting officer shall make a unilateral determination of the amount of the equitable adjustment which the contractor is entitled to and shall notify the contractor of the determination. Such unilateral determinations may not be appealed under the Disputes clause of the contract.

[41 FR 47440, Oct. 29, 1976]

Subpart 1-18.2—Formal Advertising

§ 1-18.200 Scope of subpart.

This subpart sets forth policies and procedures regarding the procurement of construction by formal advertising which is the method of procurement that shall be used whenever feasible and practicable under the circumstances. Small business restricted advertising (see Subpart 1-1.7), while generally subject to the requirements of this subpart, must also meet certain requirements applicable to negotiated contracts (e.g., the Examination of Records clause must be included).

§ 1-18.201 Types of contracts.

Generally, contracts for construction will be of a firm fixed-price type. Such fixed-price contracts may be (a) lump sum contracts for the total work or for defined parts of the work, (b) unit price contracts in which a unit price is paid for a specified quantity of units of work completed such as cubic yards of earth or concrete or square yards of pavement, or (c) a combination of both. Fixed-price contracts with escalation may be used where escalation clauses are customary in contracts for particular items if the omission of such clauses would preclude a significant number of firms from bidding, or would likely result in the inclusion of unwarranted contingencies, which would unreasonably increase the cost to the Government (see § 1-3.404-3).

§ 1-18.202 Preinvitation notices.

Where preinvitation notices are used, they should be sent to all prospective bidders sufficiently in advance of the issuance of the invitation for bids to stimulate interest on the part of the greatest number of contractors and should be furnished to organizations which maintain plan display rooms as outlined for invitations for bids in § 1-18.203-2. These notices should contain items such as:

(a) Description of the proposed work in sufficient detail to disclose its nature and magnitude in terms of physical characteristics and estimated price range;

(b) Location of the work;

(c) Tentative dates of issuance of invitations, opening of bids, and estimated time of completion;

(d) Where plans will be available for inspection without charge;

(e) A date by which request for an invitation for bids should be submitted; and

(f) A notice that, if no invitation is desired, contractors should inform the issuing office whether future preinvitation notices are desired.

§ 1-18.203 Invitations for bids.

§ 1-18.203-1 Preparation of invitations for bids.

(a) Invitations for bids shall be prepared on forms prescribed in Subpart 1-16.4 and in accordance with this section.

(b) In addition to complying with the requirements of § 1-2.201(a), invitations for bids shall contain the following to the extent applicable:

(1) The applicable wage determination of the Secretary of Labor. If it is necessary to advertise before receipt of a wage determination, a notice that the schedule of minimum wage rates to be paid under the contract will be issued as an amendment to the specifications in advance of the bid opening date;

(2) The clause concerning the amount of work the contractor must perform on the site with his own forces (see § 1-18.104);

(3) The magnitude of the proposed construction as required by § 1-18.109.

(4) Time for performance;

(5) Arrangements to be made for inspecting the site and data which may affect performance of the work (see § 1-18.204);

(6) Information concerning the furnishing, during construction, of items such as utilities, office space, and warehouse space;

(7) Information concerning prebid conference;

(8) Any special qualifications or experience requirements that will be considered in determining the responsibility of bidders;

(9) Any special instructions concerning alternates (see paragraph 5(b) of Instructions to Bidders, Standard Form 22);

(10) Instructions to the contractor concerning reporting requirements; and

(11) Any necessary instruction concerning the conduct of construction activities, covering items such as:

(i) Base lines and grades to use in construction;

(ii) Storage areas;

(iii) Access to construction site;

(iv) Construction of temporary buildings;

(v) Protection of materials and work;

(vi) Damage to existing structures, work or utilities;

(vii) Preservation of existing vegetation;

(viii) Possession of or use by the Government of any completed or partially completed part of the work;

(ix) Cleanup of the site during and after completion of construction;

(x) The handling of shop drawings; and

(xi) Safety requirements and special precautions for hazardous, toxic, and radioactive materials and processes.

(c) All invitations for bids shall allow sufficient bidding time (*i.e.*, the period of time between the date of distribution of an invitation for bids and the date set for opening of bids) to allow bidders an adequate opportunity to prepare and submit their bids, giving due regard for the construction season, the time necessary for bidders to inspect the site, obtain subcontract bids, examine data concerning the work, and prepare estimates from plans and specifications (see § 1-2.202-1).

§ 1-18.203-2 Distribution of invitations for bids.

In addition to compliance with § 1-2.203, invitations for bids (with plans and specifications) for construction work may be furnished without charge to organizations which maintain plan display rooms for the benefit of contractors, subcontractors, and material suppliers, without charge to the public. Requests from organizations in the United States may be honored on an annual or semiannual basis for all or for a stated class of construction projects. The geographical extent of this distribution shall be determined on a case-by-case basis by the contracting officer.

§ 1-18.203-3 Amendment of invitations for bids.

See §§ 1-2.207 and 1-12.404-2.

§ 1-18.204 Inspection of site and of data affecting the work.

Pursuant to Instruction 2 of Standard Form 22, Instructions to Bidders, provision should be made for bidders to inspect the construction site. Also, the opportunity should be provided for bidders to examine data available to the Government which may provide information affecting performance of the work, such as boring samples, original boring logs, and records and plans of previous construction. Such data should be assembled in one place and made available to all bidders in the same manner. Where feasible, a record should be kept of the identity and affiliation of all bidders' representatives who inspect the site or examine the data.

§ 1-18.205 Prebid conferences.

Where the contracting officer considers that a prebid conference should be held, the invitation for bids shall specify the date, time, and place at which such conference will take place. Ordinarily, this should be about midway during the bidding period. At the conference, the contracting officer or his representative shall explain the nature of the work and problems that can be expected. The design architect-engineer should be available during the conference to assist in interpreting the plans and specifications. It should be made clear to all who attend that pursuant to Instruction 1 of Standard Form 22, Instructions to Bidders, only those modifications to the invitation for bids that are covered by amendment will be considered official. A complete record shall be made of the conference.

§ 1-18.206 Opening of bids.

See § 1-2.402. At the bid opening, the relative merits of any bids shall not be discussed by Government representatives with the bidders, their representatives, or with casual observers. No statements shall be issued by Government representatives at a bid opening bearing on the prospective award, the possibility of readvertisement, mistakes in bids, etc. No oral instructions shall be given to bidders at any time during the opening. Protests of bidders and inquiries regarding the award of contract made at the bid opening shall be referred to the contracting officer after completion of the bid opening procedure for such consideration as may be appropriate under existing procedures.

§ 1-18.207 Cancellation of invitations for bids.

(a) Before opening—see § 1-2.208.

(b) After opening—see § 1-2.404-1.

§ 1-18.208 Award.

See § 1-2.407. A notice of award shall be furnished to the successful bidder as soon as possible and not later than the time set for acceptance in the invitation for bids or any extension to which the bidder has agreed. The notice of award shall:

(a) Identify the invitation;

(b) Identify the contractor's bid;

(c) Set forth the award price;

(d) Advise contractor of date by which formal contract and/or performance and payment bonds must be executed and returned; and

(e) Include directions regarding commencement of work (i.e., upon receipt of award, or upon receipt of notice to proceed which will be issued upon receipt of acceptable performance and payment bonds, as appropriate).

Subpart 1-18.3—Negotiations

§ 1-18.301 Limitation on authority to negotiate contracts.

Construction contracts shall be made by formal advertising whenever such method is feasible and practicable under existing conditions and circumstances, even though such conditions and circumstances would otherwise satisfy the requirements for negotiation in this subpart and Part 1-3. However, this provision shall not be construed to limit the use of small business restricted advertising.

§ 1-18.301-1 Work in the continental United States.

Contracts for construction work to be performed in the continental United States (49 States on the North American Continent and the District of Columbia) may be negotiated only if authorized pursuant to sections 302(c)(1), (2), (3), (10), (11), (12), or (14) of the Federal Property and Administrative Services Act of 1949, as amended (see section 302(e), 41 U.S.C. 252(e)), which Act is hereinafter referred to in this subpart as the "Act." The appropriate statutory provision(s) shall be cited in the contract as authority for negotiation. For implementing instructions, see Subpart 1-3.2.

§ 1-18.301-2 Work outside the continental United States.

Contracts for construction work to be performed outside the continental United States may be negotiated pursuant to the applicable paragraphs of section 302(c) of the Act, except that contracts to be performed in Hawaii, Puerto Rico, or any possession of the United States may not be negotiated under section 302(c)(6). Negotiated contracts shall include a citation to the statutory authority for negotiation.

§ 1-18.302 Contracts estimated not to exceed $10,000.[1]

Section 302(c)(3) of the Federal Property and Administrative Services Act of 1949, as amended, authorizes the use of negotiation for contracts (small purchases) which do not exceed $10,000. Policies and procedures for the implementation of that authority are prescribed in Subpart 1-3.6, Small Purchases. Construction contracts in excess of $2,000 are subject to certain statutory requirements such as the Davis-Bacon Act (see Subpart 1-18.7) which are applicable only to such contracts. Contract provisions which implement those statutes are set forth in the Standard Forms prescribed for use in § 1-16.402-2.

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[1] See Temporary Regulation 77 in the appendix to Chapter 1 for temporary changes to § 1-18.302.

[41 FR 27725, July 6, 1976]

§ 1-18.303 Price negotiation policies and procedures.

The policies and procedures in Subpart 1-3.8 shall be followed regardless of the type of contract used. Where a cost-plus-a-fixed-fee contract is used, the fee shall be determined in accordance with agency procedures. The statutory limit for such fees is 10 percent of the estimated cost of the contract (see § 1-3.405-5(c)).

§ 1-18.304 Subcontracting with small business concerns.

See § 1-1.710.

§ 1-18.305 Subcontracting policies and procedures.

(a) *Review and approval of contractor's purchasing system and subcontracts.* See § 1-3.903.

(b) *Subcontracting by cost-reimbursement type construction contractors.* (1) Construction work under a cost-reimbursement type prime construction contract that is to be subcontracted shall be performed to the fullest extent practicable under unit-price or lump-sum subcontracts obtained by competitive bids. Each project or phase thereof under a general contractor shall be analyzed by the contractor, in conjunction with the contracting agency, to determine those elements which can be performed under a fixed-price subcontract.

(2) The apportionment of work between the prime and subcontractors shall be based on the best interests of the Government, taking into consideration all factors including the following:

(i) The general practice of the construction industry of utilizing subcontractors for certain specialty phases of the work;

(ii) The additional management, technical, and craft skills which a specialty subcontractor may contribute to the efficient prosecution of the work, particularly on complex industrial-type facilities which require maximum concentration of such skills;

(iii) The qualifications of the prime contractor to perform such specialty work, based on the extent to which he has customarily performed the work with his own organization and the competency of his available organization to perform the work; and

(iv) The amount of work that should be performed by the prime contractor in order to ensure adequate supervision of the project (see § 1-18.104).

§ 1-18.306 Preparation for negotiation.

§ 1-18.306-1 Fixed-price type contracts.

(a) Proposals and, where required, cost or pricing data submitted by potential contractors shall be evaluated and compared with the Government estimate required by § 1-18.108. Proposals shall be required in all cases, and cost or pricing data shall be required as provided in § 1-3.807-3. Subject to the provisions of § 1-3.807-3, such data shall be required, to the extent necessary, in any case where there are significant differences between the Government estimate and the proposals submitted on any item. All data shall be evaluated and analysed, as shall cost or pricing data on subcontracts (§ 1-3.807-10) when such data is requested by the contracting officer.

(b) Where appropriate, additional pricing tools may be used, such as comparision of current prices for similar features of work, adjusted for differences in site and specifications. In addition, rough yardsticks such as cost per cubic foot for structures, cost per linear foot for utilities, cost per cubic yard for excavation, concrete, etc., may be developed and compared with proposed prices which are questioned.

§ 1-18.306-2 Cost-reimbursement type contracts.

(a) *Use of cost-reimbursement type contract.* This type of contract may be used only when it is consistent with § 1-3.405.

(b) *Information to be prepared for negotiating*—(1) *Description of the facility.* A sufficiently detailed description of the facility to be constructed shall be provided to permit an evaluation of the magnitude, physical characteristics, and complexity of its major components. For example:

(i) Major buildings and other structures, including the number of each type and an explanation of the functional requirements for each;

(ii) Major utilities; and

(iii) Major equipment to be installed by the contractor.

(2) *Services required of the contractor.* A statement should be prepared which gives the extent to which the contractor shall:

(i) Perform work with his own forces;

(ii) Procure services of subcontractors;

(iii) Procure materials and equipment;

(iv) Supervise the project; and

(v) Provide other services.

(3) *Estimated cost and time for completion.* (i) Prepare an estimate of the total cost of construction, exclusive of the contractor's fee broken down by the major components listed in the description required by paragraph (b)(1), above. To the extent available, identify labor, material, and indirect costs, and any amount included for contingencies. List separately materials and equipment that will be furnished by the Government and the total related cost.

(ii) Prepare an estimated time for completion with an explanation of the basis therefor.

(4) *Maximum fixed fee.* Determine, in accordance with agency procedures, the maximum fixed fee that may be paid for the required services.

(c) *Conclusion of negotiations.* Negotiations relative to the contract and fee shall be concluded at as early a date as practicable. When mutually acceptable terms of contract, estimate of cost, and estimate of time of performance have been agreed to, the fixed fee should be negotiated. Generally, negotiations relative to the fee shall be successfully concluded prior to making commitment on final selection. In the event it is necessary to use a letter contract, it should include the basis for determining the fee, which establishes the possible range of fees for the work. Should it be evident in the course of negotiations that no hope exists for a meeting of the minds within the previously determined maximum allowable (ceiling) fee, then consideration should be given to terminating negotiations and entering into a similar action with the next best qualified contractor (§ 1-18.307-2).

§ 1-18.306-3 Selection of a cost-reimbursement type contractor.

(a) Construction contractors for cost-reimbursement type contracts shall be selected on the basis of qualifications and the ability to provide the particular services required (see § 1-3.805-2). The evaluation for purposes of determining relative qualifications of firms under consideration should be performed in accordance with agency procedures.

(b) Fee proposals for construction services should be secured as a part of the selection procedure if evaluation shows that there are several available contractors equally well qualified to undertake construction of a project on a CPFF basis, and if the scope is sufficiently defined to permit a reasonably accurate estimate of the cost of the work. Where these conditions prevail and amounts of the fee proposals are the only significant differences in the overall proposals of several equally qualified construction contractors, the contract should be awarded on the basis of the lowest reasonable fee proposal.

(c) A completely documented record shall be made of all steps and decisions in the selection of a contractor.

§ 1-18.307 Negotiations.

§ 1-18.307-1 Fixed-price construction contracts.

Negotiations will be conducted with the responsive offerors within a competitive price range except where an award is made on initial proposals without negotiations, all as provided in § 1-3.805.

§ 1-18.307-2 Cost-reimbursement type contracts.

(a) Negotiations shall be conducted in accordance with agency procedures.

(b) The factors set forth in § 1-3.808 should be considered in negotiating the fee for a cost-reimbursement type contract.

§ 1-18.308 Audit as a pricing aid.

See § 1-3.809.

§ 1-18.309 Record of negotiations.

The record of negotiations shall demonstrate conformity with the requirements of § 1-3.101 and, to the extent applicable, include the general type of information indicated in the paragraphs below. The scope and detail of information to be included generally should be determined on the basis of the nature, dollar value, and complexity of the transactions involved:

(a) Name and address of contractor;

(b) Location of construction site;

(c) Contract number;

(d) Nature of contract action (letter contract, conversion of letter contract, etc., as well as type of contract);

(e) Program basis for the contract;

(f) Description of the project;

(g) Total price or estimated cost;

(h) Term of contract and construction schedules;

(i) Justification for use of negotiation in lieu of formal advertising;

(j) The request for proposals;

(k) Number of firms invited to submit proposals and a list of the firms quoting along with their respective quotations;

(l) Reasons for selection of the proposed contractor. (If a fixed-price award is made to other than the low offeror, explain.);

(m) A summary of principal points involved in negotiation and the final results thereof. (The record should be in sufficient detail to reflect the most significant considerations controlling the establishment of the initial or revised price or fee.);

(n) For fixed-price contracts, an explanation of why cost or pricing data were, or were not, required (see § 1-3.807) and, if not required in the case of any price negotiation in excess of $100,000, give the basis for determining that the price resulted from adequate price competition (If cost or pricing data were submitted and a certificate of cost and pricing data was required (§ 1-3.807-4), show the reliance placed upon the factual cost or pricing data submitted and the use of these data by the contracting officer in determining his total price objective.);

(o) For cost-reimbursement type contracts, the fee determination in detail including the cost breakdown used to arrive at the estimated cost for fee computation purposes;

(p) Names and locations, when available, of prospective subcontractors and estimated amounts of respective subcontracts which will exceed $100,000;

(q) If the contract contains any form of price redetermination or escalation, the reasons for such inclusion;

(r) General types and values of Government property to be furnished;

(s) Funding data; and

(t) The names and affiliations of all persons taking part in or present at the negotiations.

Subparts 1-18.4—1-18.5—[Reserved]

Subpart 1-18.6—Buy American Act

§ 1-18.600 Scope.

This subpart implements the Buy American Act (41 U.S.C. 10a-10d) and the policies set forth in Executive Order 10582, December 17, 1954 (3 CFR, 1954-1958 Comp., p. 230), as amended by Executive Order 11051, September 27, 1962 (3 CFR, 1959-1963 Comp., p. 635), with respect to construction contracts.

§ 1-18.601 Definitions.

As used in this subpart, the following definitions apply:

(a) "Construction" means construction, alteration, or repair of any public building or public work.

(b) "Construction material" means any article, material, or supply brought to the construction site for incorporation in the building or work.

(c) "Component" means any article, material, or supply directly incorporated in construction material.

(d) "Domestic construction material" means an unmanufactured construction material which has been mined or produced in the United States, or a manufactured construction material which has been manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components shall include transportation costs to the place of incorporation into the construction material and, in the case of components of foreign origin, duty (whether or not a duty-free entry certificate may be issued).

(e) "Nondomestic construction material" means a construction material other than a domestic construction material.

(f) "United States" means the States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, the Virgin Islands, and any other place subject to its jurisdiction.

§ 1-18.602 Buy American policy.

§ 1-18.602-1 General.

Only domestic construction material shall be used in the performance of contracts for construction in the United States made by executive agencies, except for particular material as to which it is determined:

(a) By the agency head, that to make such requirement is impracticable;

(b) In accordance with agency procedures, that domestic construction material is unavailable in sufficient and reasonably available commercial quantities and of a satisfactory quality; or

(c) In accordance with § 1-18.603, that to make such requirement would unreasonably increase the cost.

§ 1-18.602-2 Determining domestic construction material.

In determining whether a construction material is a domestic construction material:

(a) Only the construction material and its components shall be considered; and

(b) A component shall be considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the construction material in which it is incorporated is manufactured in the United States and the component is of a class or kind determined by the agency concerned to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

§ 1-18.602—3 Panamanian material used in Canal Zone.

Construction material mined, produced, or manufactured in the Republic of Panama, when purchased for use in the Canal Zone, is exempted from the provisions of the Buy American Act (under item 3 of the Memorandum of Understandings Reached Ancillary to the Treaty of Mutual Understanding and Cooperation between the United States of America and the Republic of Panama, signed January 25, 1955).

§ 1-18.602-4 Noting exceptions and findings.

Exceptions for nondomestic construction material because use of particular domestic construction material would be impracticable or would unreasonably increase the cost or because domestic construction material is unavailable shall be noted in the contract. Findings justifying such exceptions shall be made a matter of public record.

§ 1-18.603 Unreasonable cost determination.

§ 1-18.603-1 General.

A determination shall be made tha the use of domestic construction material would unreasonably increase th cost where, with respect to each particular construction material:

(a) A bid or proposal offers nondomestic construction material (no listed as excepted in the invitation fo bids or request for proposals), the cos of which, plus 6 percent thereof, is les than the cost of comparable domest construction material; and

(b) That bid or proposal offers th lowest price of any received, afte adding to each bid or proposal, fo evaluation purposes, 6 percent of th cost of all nondomestic constructio material, which qualifies under par graph (a), of this section, offered each bid or proposal.

§ 1-18.603-2 Cost computation.

The cost of construction materi shall be computed as including all co of delivery to the construction sit The cost of nondomestic constructio material shall also include any applicable duty. Computations shall be based on costs on the date of opening of bids or proposals.

§ 1-18.603-3 Deviations by agency head.

Deviations from the requirements of § 1-18.603-1 may be authorized by the agency head in accordance with § 1-1.009 of this chapter, the Buy American Act, and Executive Orders 10582 and 11051.

§ 1-18.603-4 Small business.

Nothing in § 1-18.603-1 shall affect the authority or responsibility of an executive agency to place a fair proportion of its total contracts with small business concerns.

§ 1-18.604 Invitation provision.

Except for contracts executed on Standard Form 19, invitations for bids and requests for proposals for affected construction work shall include the following provision:

INFORMATION REGARDING BUY AMERICAN ACT

(a) The Buy American Act (41 U.S.C. 10a-10d) generally requires that only domestic construction material be used in the performance of this contract. (See the clause entitled "Buy American" in Standard Form 23A, General Provisions, Construction Contract.) This requirement does not apply to the following construction material or components:

[List the excepted construction material or components.]

(b)(1) Furthermore, bids or proposals offering use of additional nondomestic construction material may be acceptable for award if the Government determines that use of comparable domestic construction material is impracticable or would unreasonably increase the cost or that domestic construction material (in sufficient and reasonably available commercial quantities and of a satisfactory quality) is unavailable. Reliable evidence shall be furnished justifying such use of additional nondomestic construction material.

(2) Where it is alleged that use of domestic construction material would unreasonably increase the cost:

(i) Data shall be included, based on a reasonable canvass of suppliers, demonstrating that the cost of each such domestic construction material would exceed by more than 6 percent the cost of comparable nondomestic construction material. (All costs of delivery to the construction site shall be included as well as any applicable duty.)

(ii) For evaluation purposes, 6 percent of the cost of all additional nondomestic construction material, which qualifies under paragraph (i), above, will be added to this bid or proposal.

(3) When offering additional nondomestic construction material, bids or proposals may also offer, at stated prices, any available comparable domestic construction material, so as to avoid the possibility that failure of a nondomestic construction material to be acceptable, under (1), above, will cause rejection of the entire bid.

§ 1-18.605 Contract clause.

Except for contracts executed on Standard Form 19, contracts for affected construction work shall include the following clause:

BUY AMERICAN

(a) *Agreement.* In accordance with the Buy American Act (41 U.S.C. 10a-10d), and Executive Order 10582, December 17, 1954 (3 CFR, 1954-58 Comp., p. 230), as amended by Executive Order 11051, September 27, 1962 (3 CFR, 1959-63 Comp., p. 635), the Contractor agrees that only domestic construction material will be used (by the Contractor, subcontractors, materialmen, and suppliers) in the performance of this contract, except for nondomestic material listed in the contract.

(b) *Domestic construction material.* "Construction material" means any article, material, or supply brought to the construction site for incorporation in the building or work. An unmanufactured construction material is a "domestic construction material" if it has been mined or produced in the United States. A manufactured construction material is a "domestic construction material" if it has been manufactured in the United States and if the cost of its components which have been mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. "Component" means any article, material, or supply directly incorporated in a construction material.

(c) *Domestic component.* A component shall be considered to have been "mined, produced, or manufactured in the United States" (regardless of its source in fact) if the article, material, or supply in which it is incorporated was manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

§ 1-18.606 Violations.

If the head of the agency concerned finds there has been a failure to comply with the Buy American provisions of the contract, he shall make public his findings and no other contract for the construction, alteration, or repair of any public building or public work in the United States or elsewhere shall be awarded, as provided in the Buy American Act, to the contractor, subcontractors, materialmen, or suppliers with which the contractor is associated or affiliated, for a period of 3 years after such finding is made public. (For debarment procedures, see Subpart 1-1.6.)

§ 1-18.607 Country of manufacturer.

The following representation shall be included in all solicitations and all contract awards which exceed $10,000:

COUNTRY OF MANUFACTURER

The product which the offeror proposes to furnish ☐ is, ☐ is not manufactured, mined, or grown in the United States. If the product is not manufactured, mined, or grown in the United States, the country of manufacturer is ————.

(Approved by the Office of Management and Budget under OMB control number 3090-0061)

(End of Clause)

[47 FR 41362, Sept. 20, 1982]

Subpart 1-18.7—Labor Standards for Contracts Involving Construction

SOURCE: 38 FR 21405, Aug. 8, 1973, unless otherwise noted.

§ 1-18.700 Scope of subpart.

This subpart sets forth the labor standards applicable to construction contracts, including policies, procedures, and contract clauses, and indicates the statutory basis for these standards.

§ 1-18.701 Applicability.

The requirements of this Subpart 1-18.7 apply to contracts for construction and, under some circumstances, to other types of contracts involving construction.

§ 1-18.701-1 Construction contracts.

(a) A contract is for construction if it is solely or predominantly for construction as defined in § 1-18.101-1.

(1) These requirements are applicable only if the construction work is, or reasonably can be foreseen to be, performed at a particular site so that wage rates can be determined for the locality.

(2) These requirements do not apply to contracts solely for dismantling, demolition, or removal of improvements, though certain of the statutes mentioned herein may apply to such contracts.

(3) These requirements do not apply to contracts requiring construction work which is so closely related to research, experiment, and development that it cannot be performed separately or which is itself the subject of research, experiment, or development.

(4) These requirements apply to manufacture or fabrication of materials and components on the site by a construction contractor or subcontractor under a contract otherwise subject to these requirements but do not apply to other manufacturing or furnishing of equipment, components, or other materials.

(5) These requirements do not apply to employees of railroads operating under collective bargaining agreements that are subject to the provisions of the Railway Labor Act.

(b) Under contracts for construction as described in § 1-18.701-1(a), the requirements of this subpart apply only to work performed by mechanics and laborers at the site of the work.

(1) "Mechanics and laborers" are construed to include at least those workers whose duties are manual or physical in nature as distinguished from mental or managerial whether employed by a prime contractor or by a subcontractor of any tier. The term includes any workers who work with tools or equipment or perform the work of a trade, apprentices and trainees, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen and guards. The term does not apply to employees whose duties are nonmanual in nature, such as office worker

superintendents, technical engineers, or scientific workers, but it does apply to cooks, storekeepers, and working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties.

(2) The "site of the work" is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed and to other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the "site" because of proximity. For example, if a small office building is being erected, the "site of the work" will normally include no more than the building itself and its grounds and other land or structures "down the block" or "across the street" which the contractor or subcontractor uses in the course of his performance on the particular contract. In the case of larger contracts such as for a large building, an airport, or a dam, the "site of the work" is necessarily more extensive and includes the whole area in which the contract construction activity will take place. Fabrication plants "mobile factories," batch plants, borrow pits, job headquarters, and tool yards are part of the "site of the work" provided they are dedicated exclusively or nearly so to performance on the contract and are so located in proximity to the actual construction location that it would be reasonable to include them. Once the limits of "site of the work" have been determined, the Secretary's wage rate decision is applicable only to those mechanics and laborers employed by a contract, contractor, or subcontractor within such limits (that is, upon the "site of the work"), including drivers who temporarily leave the "site" to transport materials and equipment used in the course of contract operations.

§ 1-18.701-2 Supply, service, maintenance, or other contracts involving construction.

(a) The requirements of this Subpart 1-18.7 do not ordinarily apply to supply, service, maintenance, research and development, or other nonconstruction contracts. However, contracts predominantly for nonconstruction work may also involve construction work. Construction items under such contracts are not exempted from the requirements of this subpart simply because the work is to be performed under a contract which also requires, for example, the furnishing of supplies. On the other hand, where construction work is to be performed in support of other work such as manufacturing and furnishing of supplies, the circumstances may be such that the construction work may be so merged with nonconstruction activity or may be so fragmented in terms of the locations or time spans in which it is to be performed that it cannot be segregated as a separate contractual requirement for construction, alteration, or repair of a public building or public work. Generally, the requirements apply to, and the appropriate clauses in § 1-18.703-1 must be included in, a prime contract if:

(1) The contract contains specific requirements for substantial amounts of construction work, or it is ascertainable at the contract date that a substantial amount of construction work will be necessary for the performance of the contract. The word "substantial" relates to the type and quantity of construction work to be performed and not merely to the total value of construction work as compared to the total value of the contract; and

(2) Such construction work is physically or functionally separate from and, as a practical matter, is capable of being performed on a segregated basis from the other work required by the contract.

(b) The standard clauses provide that they will be applicable to the contract work only to the extent that such work is subject to the labor standards statutes involved. Under contracts requiring substantial amounts of segregable construction work, only such segregable construction will be covered.

(1) For example, the requirements do not apply to installation, maintenance, and alteration work incidental to furnishing supplies under a supply contract; however, if a substantial and segregable amount of construction, alteration, or repair work at the site is required, such as for installation of heavy generators and large refrigerator systems or for plant modification or rearrangement, the labor standards for construction contracts apply to the construction work at the site.

(2) Contracts for maintenance or service are not ordinarily subject to the requirements of this subpart. Maintenance includes the routine, recurring type of work necessary to keep a facility in such condition that it may be continuously used at an established capacity and efficiency for its intended purpose. However, if such maintenance or service contracts call for substantial and segregable items of construction, alteration, or repair, the labor standards provisions for construction contracts will be applicable to those items. All contracts in excess of $2,000 for painting of any public building or public work, whether performed in connection with the original construction or as regular maintenance, are subject to the labor standards provisions for construction contracts.

§ 1-18.702 Statutory and regulatory requirements.

§ 1-18.702-1 Davis-Bacon Act.

The Davis-Bacon Act (Act of March 3, 1931, as amended (40 U.S.C. 276a-276a-7)), provides that certain contracts over $2,000 entered into by any executive agency for construction, alteration, or repair (including painting and decorating) of public buildings or public works within the United States shall contain a provision (see § 1-18.703-1(a)) to the effect that no laborer or mechanic employed directly upon the site of the work contemplated by the contract shall receive less than the prevailing rates of wages as determined by the Secretary of Labor. The term "wages" as used in the Davis-Bacon Act includes the basic hourly rate of pay, the rate of contribution irrevocably made by an employer pursuant to a fund, plan, or program, and the rate of costs to the employer which may be reasonably anticipated in providing certain bona fide fringe benefits.

§ 1-18.702-2 Copeland Act.

The Copeland ("Anti-kickback") Act (18 U.S.C. 874 and 40 U.S.C. 276c) makes it unlawful to induce, by force or otherwise, any person employed in the construction, prosecution, completion, or repair of public buildings, public works, or buildings, or works including those financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment. In accordance with regulations of the Secretary of Labor issued pursuant to the Copeland Act, certain contracts entered into by any executive agency shall contain a provision (see § 1-18.703-1(e)) to the effect that the contractors and any subcontractor shall comply with the regulations of the Secretary of Labor under the Act.

§ 1-18.702-3 Contract Work Hours and Safety Standards Act.

In accordance with the requirements of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), certain contracts entered into by any executive agency must contain a clause (see § 1-18.703-1(b)) to the effect that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than 8 hours in any one calendar day or 40 hours in any workweek unless such laborer or mechanic is compensated at not less than one and one-half times his basic rate of pay for all hours worked in excess of 8 hours in any one calendar day or 40 hours in any workweek. The workmen will be paid according to the calculation which represents the greater number of overtime hours.

§ 1-18.702-4 Department of Labor regulations.

Pursuant to the statutes referred to in this § 1-18.702 and Reorganization Plan No. 14 of 1950 (3 CFR, 1949-53 Comp., p. 1007), the Secretary of Labor has issued regulations in Parts 1, 3, 5, 5a, and 7 of Title 29, Subtitle A Code of Federal Regulations, providing for the administration and enforcement of those statutes in con struction contracts. The Secretary's regulations cover the following wage determination procedures: Duties of contractors on Government-financed public buildings; labor standards for construction contracts; standards for ratios of apprentices and trainees to journeymen; and wage determination review procedures.

§ 1-18.703 Contract clauses.

§ 1-18.703-1 Clauses for general use.[1]

Except as provided in § 1-18.703-2, every construction contract in excess of $2.000 (or of such other amount as may be specifically indicated) for work within the United States shall include the following clauses:

(a) *Davis-Bacon Act (40 U.S.C. 276a-276a-7).*

DAVIS-BACON ACT (40 U.S.C. 278a-276a-7)

(a) All mechanics and laborers employed or working directly upon the site of the work shall be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by the Copeland Regulations, 29 CFR Part 3), the full amounts due at time of payment computed at wage rates not less than the aggregate of the basic hourly rates and the rates of payments, contributions, or costs for any fringe benefits contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics. A copy of such wage determination decision shall be kept posted by the Contractor at the site of the work in a prominent place where it can be easily seen by the workers. The term "mechanics and laborers" shall be deemed to included apprentices and trainees not covered by an approved program as provided by the Apprentices and Trainees clause of this contract.

(b) The Contractor may discharge his obligation under this clause to workers in any classification for which the wage determination decision contains:

(1) Only a basic hourly rate of pay, by making payment at not less than such basic hourly rate, except as otherwise provided in the Copeland Regulations (29 CFR Part 3); or

(2) Both a basic hourly rate of pay and fringe benefits payments, by making payment in cash, by irrevocably making contributions pursuant to a fund, plan, or program for, and/or by assuming an enforceable commitment to bear the cost of, bona fide fringe benefits contemplated by the Davis-Bacon Act, or by any combination thereof. Contributions made, or cost assumed, on other than a weekly basis shall be considered as having been constructively made or assumed during a weekly period to the extent that they apply to such period. Where a fringe benefit is expressed in a wage determination in any manner other than as an hourly rate and the Contractor pays a cash equivalent or provides an alternative fringe benefit, he shall furnish information with his payrolls showing how he determined that the cost incurred to make the cash payment or to provide the alternative fringe benefit is equal to the cost of the wage determination fringe benefit. In any case where the Contractor provides a fringe benefit different from any contained in the wage determination he shall similarly show how he arrived at the hourly rate shown therefor. In the event of disagreement between or among the interested parties as to an equivalent of any fringe benefit, the Contracting Officer shall submit the question, together with his recommendation, to the Secretary of Labor for final determination.

(c) The assumption of an enforceable commitment to bear the cost of fringe benefits, or the provision of any fringe benefits not expressly listed in section 1(b)(2) of the Davis-Bacon Act or in the wage determination decision forming a part of the contract, may be considered as payment of wages only with the approval of the Secretary of Labor pursuant to a written request by the Contractor. The Secretary of Labor may require the Contractor to set aside assets, in a separate account, to meet his obligations under any unfunded plan or program.

(d) The Contracting Officer shall require that any class of laborers or mechanics, including apprentices and trainees, which is not listed in the wage determination decision and which is to be employed under the contract shall be classified or reclassified conformably to the wage determination decision, and shall report the action taken to the Secretary of Labor. If the interested parties cannot agree on the propoer classification or reclassification of a particular class of laborers or mechanics, including apprentices and trainees to be used, the Contracting Officer shall submit the question, together with his recommendation, to the Secretary of Labor for final determination. Apprentices and trainees may be added under this clause only where they are employed pursuant to an apprenticeship or trainee program meeting the requirements of the Apprentices and Trainees clause below.

(e) In the event it is found by the Contracting Officer that any laborer or mechanic, including apprentices and trainees, employed by the Contractor or any subcontractor directly on the site of the work covered by this contract has been or is being paid at a rate of wages less than the rate of wages required by paragraph (a) of this clause, or by the Apprentices and Trainees clause of this contract, the Contrating Officer may (1) by written notice to the Government Prime Contractor terminate his right to proceed with the work, or such part of the work as to which there has been a failure to pay said required wages, and (2) prosecute the work to completion by contract or otherwise, whereupon such Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

(f) Paragraphs (a) through (e) of the clause shall apply to this contract to the extent that it is (1) a prime contract with the Government subject to the Davis-Bacon Act, or (2) a subcontract also subject to the Davis-Bacon Act under such prime contract.

(b) *Contract Work Hours and Safety Standards Act—Overtime Compensation (40 U.S.C. 327-333).*

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT—OVERTIME COMPENSATION (40 U.S.C. 327-333)

This contract is subject to the Contract Work Hours and Safety Standards Act and to the applicable rules, regulations, and interpretations of the Secretary of Labor.

(a) The Contractor shall not require or permit any laborer or mechanic, including apprentices, trainees, watchmen, and guards, in any workweek in which he is employed on any work under this contract to work in excess of 8 hours in any calendar day or in excess of 40 hours in such workweek on work subject to the provisions of the Contract Work Hours and Safety Standards Act unless such laborer or mechanic, including apprentices, trainees, watchmen, and guards, receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked in excess of 8 hours in any calendar day or in excess of 40 hours in such workweek, whichever is the greater number of overtime hours. The "basic rate of pay," as used in this clause, shall be the amount paid per hour, exclusive of the Contractor's contribution or cost for fringe benefits, and any cash payment made in lieu of providing fringe benefits, or the basic hourly rate contained in the wage determination, whichever is greater.

(b) In the event of any violation of the provisions of paragraph (a), the Contractor shall be liable to any affected employee for any amounts due, and to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including an apprentice, trainee, watchman, or guard, employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of 8 hours or in excess of the standard workweek of 40 hours without payment of the overtime wages required by paragraph (a).

* * * * *

(c) *Apprentices and Trainees.*

APPRENTICES AND TRAINEES

(a) Apprentices shall be permitted to work at less than the predetermined rate for the work they performed (1) when they are employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or (2) if a person is employed in his first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of apprenticeship and Training or State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the Contrator as to his entire work force under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not a trainee as defined in paragraph (b) of this clause or who is not registered or otherwise employed as stated above, shall be paid the wage rate determined by the Secretary of Labor for the classification of work he actually performed. The Contractor or subcontractor shall furnish to the Contracting Officer written evidence of the registration of his program and apprentices as well as the appropriate ratios and wage rates (expressed in percentages of the journeymen hourly rates) for the area of construction, prior to using any apprentices on the contract work. The wage rate paid apprentices shall be not less than the appropriate percentage of the journeymen's rate contained in the applicable wage determination.

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[1] See Temporary Regulation 70 in the appendix to Chapter 1 for temporary changes to § 1-18.703-1

(b) Trainees shall be permitted to work at less than the predetermined rate for the work performed when they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification, by the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. The term "trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, as meeting its standards for on-the-job training programs and which has been so certified by the Bureau. The ratio of trainees to journeymen on this contract shall not be greater than the ratio permitted under the plan approved by the Bureau of Apprenticeship and Training. Every trainee must be paid at not less than the rate specified in the approved program for his level of progress. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Bureau of Apprenticeship and Training shall be paid not less than the wage rate determined by the Secretary of Labor for the classification of work he actually performed. The Contractor or subcontractor shall furnish the Contracting Officer written evidence of the certification of his program, the registration of the trainees, and the ratios and wage rates prescribed in that program. In the event the Bureau of Apprenticeship and Training withdraws approval of a training program, the Contractor shall no longer utilize trainees at less than the applicable predetermined rate for work performed until an acceptable program is approved.

(c) The utilization of apprentices, trainees, and journeymen under this clause shall be in conformity with the equal employment opportunity requirements of this contract.

(d) If at any time the Bureau of Apprenticeship and Training determines, after opportunity for a hearing, that the standards of a training program have not been complied with, or that such a program fails to provide adequate training for participants, the Contractor shall not utilize trainees at less than the predetermined rate for the classification of work actually performed until an acceptable program is approved. If the Contractor brings an appeal pursuant to 29 CFR 5.17 within 30 days of his receipt of a certified letter withdrawing the Bureau of Apprenticeship and Training's approval, the effect of the withdrawal of approval of the program will be delayed until a decision is rendered on the appeal pursuant to 29 CFR 5.17.

(d) *Payrolls and Basic Records.*

PAYROLLS AND BASIC RECORDS

(a) The Contractor shall maintain payrolls and basic records relating thereto during the course of the work and shall preserve them for a period of 3 years thereafter for all laborers and mechanics, including apprentices, trainees, watchmen, and guards working at the site of the work. Such records shall contain the name and address of each such employee, his correct classification, rate of pay (including rates of contributing for or costs assumed to provide, fringe benefits), daily and weekly number of hours worked, deductions made, and actual wages paid. Whenever the Contractor has obtained approval from the Secretary of Labor as provided in paragraph (c) of the clause entitled "Davis-Bacon Act", he shall maintain records which show the commitment, its approval, written communication of the plan or program to the laborers or mechanics affected, and the costs anticipated or incurred under the plan or program.

(b) The Contractor shall submit weekly a copy of all payrolls to the Contracting Officer. The Government Prime Contractor shall be responsible for the submission of copies of payrolls of all subcontractors. The copy shall be accompanied by a statement signed by the Contractor indicating that the payrolls are correct and complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor, and that the classification set forth for each laborer or mechanic, including apprentices and trainees conform with the work he performed. Submission of the "Weekly Statement of Compliance" required under this contract and the Copeland Regulations of the Secretary of Labor (29 CFR Part 3) shall satisfy the requirement for submission of the above statement. The Contractor shall submit also a copy of any approval by the Secretary of Labor with respect to fringe benefits which is required by paragraph (c) of the clause entitled "Davis-Bacon Act". Contractors employing apprentices or trainees under approved programs shall include a notation on the first weekly certified payrolls submitted to the contracting agencies that their employment is pursuant to an approved program and shall identify the program.

(c) The Contractor shall make the records required under this clause available for inspection by authorized representatives of the Contracting Office and the Department of Labor and shall permit such representatives to interview employees during working hours on the job.

Note: Watchmen and guards appear on payroll records only for purposes of the

Contract Work Hours and Safety Standards Act.

* * * * *

(e) *Compliance with Copeland Regulations.*

COMPLIANCE WITH COPELAND REGULATIONS

The Contractor shall comply with the Copeland Regulations of the Secretary of Labor (29 CFR Part 3) which are incorporated herein by reference.

(f) *Withholding of Funds.*

WITHHOLDING OF FUNDS

(a) The Contracting Officer may withhold or cause to be withheld from the Government Prime Contractor so much of the accrued payments or advances as may be considered necessary (1) to pay laborers and mechanics, including apprentices, trainees, watchmen, and guards employed by the Contractor or any subcontractor on the work the full amount of wages required by the contract, and (2) to satisfy any liability of the Contractor and any subcontractor for liquidatd damages under paragraph (b) of the clause entitled "Contract Work Hours and Safety Standards Act—Overtime Compensation."

(b) If the Contractor or any subcontractor fails to pay any laborer, mechanic, apprentice, trainee, watchman, or guard employed or working on the site of work, all or part of the wages required by the contract, the Contracting Officer may after written notice to the Government Prime Contractor, take such action as may be necessary to cause suspension of any further payments or advances until such violations have ceased.

* * * * *

(g) *Subcontracts.*

SUBCONTRACTS

The Contractor agrees to insert the clauses hereof entitled "Davis-Bacon Act," "Contract Work Hours and Safety Standards Act—Overtime Compensation," "Apprentices and Trainees," "Payrolls and Basic Records," "Compliance with Copeland Regulations," "Withholding of Funds," "Subcontracts," and "Contract Termination—Debarment" in all subcontracts. The term "Contractor" as used in such clauses in any subcontract shall be deemed to refer to the subcontractor except in the phrase "Government Prime Contractor."

(h) *Contract termination—debarment.*

CONTRACT TERMINATION—DEBARMENT

A breach of the clauses hereof entitled "Davis-Bacon Act," "Contract Work Hours and Safety Standards Act—Overtime Compensation," "Apprentices and Trainees," "Payrolls and Basic Records," "Compliance with Copeland Regulations," "Withholding of Funds," and "Subcontracts" may be grounds for termination of the contract, and for debarment as provided in 29 CFR 5.6.

(i) *Disputes concerning labor standards.*

DISPUTES CONCERNING LABOR STANDARDS

Disputes arising out of the labor standards provisions of this contract shall be subject to the Disputes clause except to the extent such disputes involve the meaning of classifications or wage rates contained in the wage determination decision of the Secretary of Labor or the applicability of the labor provisions of the contract which questions shall be referred to the Secretary of Labor in accordance with the procedures of the Department of Labor.

[38 FR 21405, Aug. 8, 1973; 38 FR 23791, Sept. 4, 1973, as amended at 40 FR 48326, Oct. 14, 1975; 44 FR 20692, Apr. 6, 1979]

§ 1-18.703-2 Contracts with a State or political subdivision.

In the case of construction contracts with a State or political subdivision thereof, the contract clauses required by § 1-18.703-1 shall be inserted therein but shall be prefaced by the following provision:

The Contractor agrees to comply with the requirements of the Contract Work Hours and Safety Standards Act, and to insert the following clauses in all subcontracts hereunder with private persons or firms.

§ 1-18.703-3 Overseas contracts.

Every construction contract in excess of $2,000 for work outside the United States, but which is nevertheless subject to the Contract Work Hours and Safety Standards Act as set forth in § 1-12.302(d), shall include the clause in § 1-12.303. Standard Form 19-A should not be used in such contracts (see § 1-16.402).

§ 1-18.704 Wage determinations.

§ 1-18.704-1 General.

Wage determinations reflecting the prevailing wages, including fringe benefits, for laborers and mechanics in a particular area are issued by the Department of Labor. See 29 CFR Part 1 for Department of Labor regulations dealing with questions relating to determination procedures.

§ 1-18.704-2 Types of wage determinations.[1]

(a) A general or area wage determination is published in the FEDERAL REGISTER for use by all Government agencies and provides wage rates for all contracts for the types of construction designated in the determination which may be awarded within a given geographical area. These general or area wage determinations contain no expiration date and shall be modified and the modifications published in the FEDERAL REGISTER on a timely basis to keep them current.

(b) A project area or installation (54A) determination is issued for use by the requesting Federal agency and provides wage rates for all contracts for work described in the determination which may be awarded at an installation or within a given geographical area (usually a county) during the life of the determination. This type of determination is used only when no general wage determination has been issued, and may be requested for installations or areas where continuing construction activity is anticipated. These wage determinations are effective for 120 calendar days from the date of initial issue and are void for incorporation into contracts awarded after that period unless extended as provided in 29 CFR 5.4.

(c) An individual determination (sometimes referred to as "a project determination") is provided upon request for use in a contract to be performed at an installation, or in an area, not covered by either of the above types of determination. These individual wage determinations are effective for 120 calendar days from the date of initial issue and are void for incorporation into contracts awarded after that period unless extended as provided in 29 CFR 5.4.

§ 1-18.704-3 Procedure for requesting determinations.[1]

(a) *Requests for project area or individual wage determinations.* Requests shall be submitted on completed Standard Form 308, Request for Determination and Response to Request, to the Regional Administrator of the Employment Standards Administration, Department of Labor, who has jurisdiction within the geographic area where the applicable project will be performed. Only those classifications shall be checked on the form which will be needed in the performance of the work. Needed classifications that are not on the form may be added. The agency shall not list classifications which can be fitted into classifications on the form, or classifications which are not generally recognized in the area or in the construction industry. Requests shall:

(1) Include a sufficiently detailed description of the work to indicate the type of construction involved; i.e., building, heavy, highway, or other type;

(2) Include the location of the project, giving the distance in miles and the direction from the nearest point of reference;

(3) Include the agency's evaluation of whether the project is a building, heavy, highway, or other type of construction project;

(4) Be accompanied by any available pertinent wage payment information unless the wage patterns in the area are clearly established; and

(5) Include a complete statement of the incidence of use of the last previously issued installation determination, the total dollar amount of the contracts awarded thereunder, and an estimate of the use of any new determination during its 120-day life. This should include a brief description of the planned projects (i.e., commercial, residential, heavy, or highway), the estimated cost of each project, and the kinds of laborers and mechanics likely to be employed.

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[1] See Temporary Regulation 70 in the appendix to Chapter 1 for temporary changes to § 1-18.704-2.

[1] See Temporary Regulation 70 in the appendix to Chapter 1 for temporary changes to § 1-18.704-3.

The addresses of the various Regional Administrators of the Employment Standards Administration are set forth below:

BOSTON REGION

For the States of Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, and Connecticut:

Regional Administrator, Employment Standards Administration, U.S. Department of Labor, Room 1612C, John F. Kennedy Federal Building, Government Center, Boston, MA 02203 (Telephone: 617-223-2035).

NEW YORK REGION

For the States of New York and New Jersey and for Puerto Rico and the Virgin Islands: Regional Administrator, Employment Standards Administration, U.S. Department of Labor, 1515 Broadway, New York, NY 10036 (Telephone: 212-971-5451).

PHILADELPHIA REGION

For the States of Pennsylvania, Maryland, Delaware, Virginia, West Virginia, and the District of Columbia:

Regional Administrator, Employment Standards Administration, U.S. Department of Labor, Room 704C, 1317 Filbert Street, Philadelphia, PA 19107 (Telephone: 215-597-9633).

ATLANTA REGION

For the States of Florida, Georgia, North Carolina, South Carolina, Tennessee, Alabama, Kentucky, and Mississippi:

Regional Administrator, Employment Standards Administration, U.S. Department of Labor, Room 331, 1371 Peachtree Street NE, Atlanta, GA 30309 (Telephone: 404-526-5801).

CHICAGO REGION

For the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

Regional Administrator, Employment Standards Administration, U.S. Department of Labor, U.S. Courthouse and Federal Office Building, Room 742, 219 South Dearborn Street, Chicago, IL 60604 (Telephone: 312-353-7280).

DALLAS REGION

For the States of Texas, New Mexico, Oklahoma, Arkansas, and Louisiana:

Regional Administrator, Employment Standards Administration, U.S. Department of Labor, Room 13F12, 1100 Commerce Street, Dallas, TX 75202 (Telephone: 214-749-2037).

KANSAS CITY REGION

For the States of Missouri, Kansas, Nebraska, and Iowa:

Regional Administrator, Employment Standards Administration, U.S. Department of Labor, Room 2000, Federal Office Building, 911 Walnut Street, Kansas City, MO 64102 (Telephone: 816-374-5384).

DENVER REGION

For the States of Colorado, North Dakota, South Dakota, Utah, Wyoming, and Montana:

Regional Administrator, Employment Standards Administration, U.S. Department of Labor, Room 246, 232 New Customhouse, 721 19th Street, Denver, CO 80202 (Telephone: 303-837-4613).

SAN FRANCISCO REGION

For the States of California, Nevada, Arizona, and Hawaii, and for Guam, and various Pacific Islands:

Regional Administrator, Employment Standards Administration, U.S. Department of Labor, 450 Golden Gate Avenue, Room 10431, San Francisco, CA 94102 (Telephone: 415-556-1318).

SEATTLE REGION

For the States of Washington, Oregon, Idaho, and Alaska:

Regional Administrator, Employment Standards Administration, U.S. Department of Labor, 2008 Smith Tower, 506 Second Avenue, Seattle, WA 98104 (Telephone: 206-442-1536).

(b) *Requests for general wage determinations.* A contracting agency may submit a request to the Administrator, Wage and Hour Division, Department of Labor, for issuance of a general (area) wage determination for use on individual contracts for a particular type of construction in a particular area whenever (1) the wage patterns for the particular type of construction are well settled in that area, and (2 the agency anticipates a large volume of the particular type of construction in the area. The request shall include the information set forth in paragraph (a) of this section. The Administrator will issue such a determination pursuant to such a request or at his own discretion.

(c) *Time of submission of requests.* Requests for wage determinations ordinarily should be submitted to the Department of Labor at least 30 calendar days before they are required fo use in advertising for bids or for entering into negotiations of the contract for which the determinations are sought.

(d) *Limitations.* Each project area and individual wage determination is effective for 120 calendar days from the date of the determination, and is applicable only to contract awards made within that period. Accordingly, if it appears that a wage determination will expire before a contract can be awarded, a new determination should be requested at a date which will permit its receipt and issuance to prospective bidders by amendment of the invitation for bids before the date set for bid opening. In individual cases, upon a written finding by the head of the agency that due to unavoidable circumstances a wage determination expired after bid opening but before award, the Administrator, Wage and Hour Division, Department of Labor, may extend the period of effectiveness of the wage determination whenever he finds it necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. General wage determinations normally will be published in the FEDERAL REGISTER on Fridays and will contain no expiration date (see § 1-18.704-2(a)).

(e) *Modification.* On any negotiated procurement a modification of a project area or individual wage determination by an appropriate Department of Labor official shall be made part of the proposed contract if received prior to the award of the contract. However, in procurements involving formal advertising or small business restricted advertising, any modification received by the contracting agency concerned less than 10 calendar days before the opening of bids shall be disregarded unless it is determined that such modifications reasonably can be furnished to bidders by means of an amendment of the invitation for bids in time to be considered in the preparation of their bids. Modifications received by an agency should be time-date stamped to show the date of receipt by the agency. A modification of a general wage determination shall be incorporated in a negotiated contract if published in the FEDERAL REGISTER prior to completion of negotiation; if published in the FEDERAL REGISTER less than 10 calendar days before the opening of bids on an advertised procurement, the modification shall not be effective unless the agency finds that there is a reasonable time in which to notify bidders of the modification.

[38 FR 21405, Aug. 8, 1973, as amended at 44 FR 20693, Apr. 6, 1979]

§ 1-18.704-4 Rates to be included in solicitations.

In solicitations for work in an area covered by either a general area wage determination, or a project area or installation (54A) determination, containing more than one schedule (i.e., building construction, heavy, and highway construction) there shall be included only the rate schedule or individual rates applicable to the particular type of construction involved. In cases requiring the utilization of more than one schedule, the item of work to which each schedule is applicable shall be defined.

§ 1-18.704-5 Wage determinations in solicitations and awards.

(a) *Formally advertised procurements.* (1) Whenever it appears before bid opening that a wage determination may expire before award, or a determination actually does expire before bid opening, a new determination shall be requested. The scheduled bid opening date shall be postponed, if necessary, to allow a reasonable time to (i) obtain the determination, (ii) modify the invitation for bids to reflect the new determination, and (iii) permit bidders to amend their bids. Even if the new determination does not change the wage rates, and hence would not warrant amended bids, the solicitation must nevertheless be modified to include the number and date of the new determination.

(2) After bids have been opened in a formally advertised procurement, if a wage determination may expire before award, the agency head or his designee may, upon finding that an extension is in the public interest to prevent injustice, undue hardship, or serious impairment of the conduct of Government business, submit a written request for an extension of the expiration date to the Administrator, Wage and Hour Division, Department of Labor, who may extend the period of effectiveness of the determination. If an extension is not requested, or if an extension is requested and denied, a new wage determination shall be requested. If the new determination changes the wage rates, the invitation for bids shall be changed and the procurement readvertised using the new wage rates.

(b) *Negotiated procurements.* Whenever (1) it appears that a wage determination will expire before award is made, or (2) the determination actually does so expire, a new wage determination shall be requested. If the new determination makes a change in the wage rates, the wage rate information specified in the new determination shall be furnished to (1) all prospective offerors to whom a solicitation has been sent if the closing date for receipt of proposals has not yet occurred, or (2) to all prospective offerors who have submitted proposals if the closing date is past. All prospective offerors to whom such information has been furnished shall be given a reasonable opportunity to amend their proposals. The contracting officer need not delay opening and reviewing proposals or discussing them with the respective offerors while a new determination is being sought and offerors are preparing amended proposals. Offerors should be requested to extend the period for acceptance of any proposal if that period expires or may expire while the contracting officer is waiting for a new wage determination.

(c) *Receipt of new determination before expiration of original determination.* When a new determination has been requested and received before award, but an award is made before the expiration date of the original determination, the new determination must be treated as a superseding decision in accordance with § 1-18.704-7, except that the expiration of the new determination shall be controlled by the date thereon and not by the date on the determination which it replaces.

§ 1-18.704-6 Formal advertising without a wage determination.

In the event a solicitation is to be issued before the wage determination is obtained a notice shall be included in the invitation for bids that the schedule of minimum wage rates to be paid under the contract will be issued as an amendment to the specifications. Under no circumstances may bids be opened until a reasonable time after the wage determination has been furnished to all bidders.

§ 1-18.704-7 Modifications of wage determinations.[1]

(a) During the life of any wage determination, it may be modified (1) by the "letter of inadvertence," which is used to correct a clerical error in a wage determination, (2) a "notice of modification," which specifies a change in a wage determination, or (3) a "superseding decision," which is a reissuance of a wage determination with changes incorporated. All modifications (including superseding decisions) expire on the same day as the original determination. Since the need for inclusion of a modification in a solicitation is determined by the time of receipt in the agency concerned, all modifications shall be time-date stamped immediately upon receipt by the agency concerned. The need for inclusion of a modification of a general wage determination is determined by the publication date in the FEDERAL REGISTER.

(b) A modification which affects wage rates included in a solicitation, and which was received by the agency concerned earlier than 10 calendar days before bid opening, or a modification published in the FEDERAL REGISTER within 10 days before bid opening, in formally advertised procurements or award in negotiated procurements shall be processed upon receipt by the contracting officer as follows (note distinction between agency and contracting officer):

(1) *Formally advertised procurements.* If the modification reaches the

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[1] See Temporary Regulation 70 in the appendix to Chapter 1 for temporary changes to § 1-18.704-7.

contracting officer before bid opening, he shall issue an amendment to the invitation for bids and, if necessary, extend the date of bid opening.

(2) *Negotiated procurements.* If the modification reaches the contracting officer before award, he shall notify the appropriate offerors and allow them sufficient time to adjust their offers accordingly.

(c) A modification which affects wage rates included in a solicitation, and which was received by the agency concerned later than 10 days before the bid opening in formally advertised procurements or published in the FEDERAL REGISTER later than 10 days before award in negotiated procurements, must be included in the solicitation only where such action will not delay bid opening or otherwise create excessive administrative burdens and may otherwise be disregarded. A modification which accordingly is not included in the solicitation shall not be included in advertised contracts after bid opening or in negotiated contracts after award.

§ 1-18.704-8 Wage determinations appeals.

The Secretary of Labor has established a Wage Appeals Board, one of whose powers is to decide appeals concerning questions of law and fact arising from decisions of the Associate Administrator, Division of Wage Determinations, with regard to wage determinations issued under the Davis-Bacon Act and related minimum wage statutes. Each contracting agency, in accordance with ~~procedures established by it~~, may file a petition for review of, or for intervention, in any matter which it appears may appropriately be brought before the Board in accordance with procedures established for the Wage Appeals Board in 29 CFR Part 7.

§ 1-18.705 Administration and enforcement.

§ 1-18.705-1 Policy.

(a) *General.* To comply with the Government policy of insuring full and impartial enforcement of the labor standards laws in the administration of construction contracts, agencies shall maintain a continuing effective enforcement program which shall include:

(1) Insuring that contractors and subcontractors are informed, prior to commencement of work, of their obligations under the labor standards provisions of their contracts;

(2) Adequate payroll and on-the-site inspections and employee interviews to determine compliance, and prompt initiation of corrective action when required;

(3) Prompt investigation and disposition of complaints; and

(4) Prompt submission of all reports required by this subpart.

(b) *Responsibility.* The contracting officer shall ascertain that the contractor is fully informed of the labor standards provisions of the contract and of his and any subcontractor's responsibilities thereunder. Unless it is clear that the contractor is otherwise fully informed, the contractor shall be so informed either by a preconstruction letter or a preconstruction conference promptly after award of the contract. Whenever the clauses under § 1-18.703-1 are applicable, the action prescribed by this § 1-18.705 shall be taken or required in accordance with procedures prescribed by each agency. Whenever the clauses under §§ 1-18.703-2 and 1-18.703-3 are applicable, the action prescribed by this § 1-18.705 shall be taken or required, in accordance with procedures prescribed by each respective agency, to the extent pertinent to the applicable clauses.

§ 1-18.705-2 Wages, fringe benefits, and overtime.

(a) In computing wages paid to a laborer or mechanic, including apprentices and trainees, the contractor may include any of the following items:

(1) Amounts paid in cash to the laborer or mechanic, or deducted from such payment in accordance with 29 CFR Part 3;

(2) Contributions, except those required by Federal, State, or local law, which the contractor makes irrevocably to a trustee or a third party pursuant to any fund, plan, or program to provide for medical or hospital care, pensions, compensation for injuries or illness resulting from occupational activity, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, defraying costs of apprenticeship, or any other fringe benefit but contributions or payments for fringe benefits are allowed only for the specific fringe benefits contained in the applicable wage determination decision involved; and

(3) Other contributions or anticipated costs to the extent such contributions or anticipated costs have been expressly approved by the Secretary of Labor.

(b) Where the wage determination decision specifies fringe benefits payments, the contractor may satisfy his obligation under the clause entitled Davis-Bacon Act by providing wages consisting of any combination of contributions or costs as specified in paragraph (a), of this section: *Provided*, That the total cost of such combination is not less than the total of the basic hourly rate and fringe benefits payments prescribed in the wage determination decision for the classification of laborer or mechanic concerned. Wages provided by the contractor, or fringe benefits payments required by the wage determination decision, may include items which are not stated as exact cash amounts. In such cases, the interested parties shall determine the cash equivalent of the cost of such items when necessary to determine whether the wages provided by the contractor satisfy the requirements of the wage determination. In the event the interested parties are unable to agree on the cash equivalent, the contracting officer, in accordance with paragraph (b) of the clause entitled Davis-Bacon Act, shall submit the question for determination to the Department of Labor, in accordance with agency procedures. The submission shall include a comparison of the payments, contributions, or costs contained in the wage determination decision with those made or proposed by the contractor as equivalent thereto, together with the comments and recommendations of the contracting officer.

(c) For purposes of computing required overtime payments, the basic rate of pay specified in the wage determination, or that actually paid by the contractor if higher, shall be used. The basic rate does not include any amount paid as fringe benefits, and overtime is not required to be paid on the contractor's contributions, costs, or payment of cash equivalent for fringe benefits. In no event may overtime be computed on a rate lower than the basic rate specified in the wage determination.

§ 1-18.705-3 Additional classifications.[1]

(a) *Requirements.* Whenever any laborer or mechanic is to be employed in a classification not listed in the wage determination applicable to the contract, the contractor shall submit to the contracting officer a statement of the proposed additional classification and minimum wage rate, including fringe benefits payments, if any. Upon approval, the additional classification and rate shall be posted with the wage determination.

(b) *Approval.* Upon receipt of the request for authorization, the contracting officer shall review it to determine whether it meets the following criteria:

(1) The classification is an appropriate one which cannot be fitted into a classification contained in the applicable wage determination; and

(2) The proposed wage rate, including any fringe benefits, conforms to the wage determination contained in the contract.

If the above criteria are met and no interested party objects to the proposed classification, the contracting officer or his representative shall approve the proposal and submit an information copy to the Department of Labor. If the criteria are not met or the interested parties cannot agree on the proposal, the contracting officer or his representative shall submit the proposal, together with available pertinent information, and his recommendation to the Department of Labor for final determination. Upon approval, the contracting officer shall notify the contractor and instruct him to post the approved rate and classification in accordance with § 1-18.705-7.

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[1] See Temporary Regulation 70 in the appendix to Chapter 1 for temporary change to § 1-18.705-3.

§ 1-18.705-4 Apprentices and trainees.

(a) As provided in paragraph (a) of the clause set forth in § 1-18.703-1(c), the contractor or subcontractor is required to furnish written evidence of registration of his program and apprentices as well as of the ratios allowed and the wage rates for the area of construction before using any apprentices on the contract work. Likewise, as provided in paragraph (b) of the clause set forth in § 1-18.703-1(c), the contractor or subcontractor is required to furnish written evidence of the certification of his program, the registration of the trainees, and the ratios and wage rates prescribed by that program before using any trainees on the contract work.

(b) Contractors planning to use apprentices on a construction project are required to obtain written evidence of registration of such employees in a program registered under the State apprenticeship agency which is recognized by the Bureau of Apprenticeship and Training, Department of Labor. If no such agency exists within a State, an apprentice must be enrolled under a program registered with the Bureau of Apprenticeship and Training, Department of Labor. The contractor will then submit to the contracting officer this evidence of registration, together with evidence of the established apprenticeship-journeyman ratios and wage rates in the project area, which will be the basis for establishing such ratios and rates for the project. These data will be maintained by the contracting officer with payroll records.

(c) Contractors planning to use trainees on a construction project are required to obtain written evidence of registration of such employees in a program certified by the Bureau of Apprenticeship and Training, Department of Labor. The contractor will then submit to the contracting officer this evidence of certification of his program and the registration of the trainees together with evidence of established trainee-journeyman ratios and wage rates prescribed in the program. This data will be maintained by the contracting officer with payroll records.

(d) Enforcement activities, including the investigation of complaints of violations, to ensure compliance with the requirements of the clause entitled "Apprentices and Trainees" shall be the primary duty of the agency awarding the contract or providing the Federal assistance. The Department of Labor will coordinate its efforts with the various agencies.

[40 FR 48327, Oct. 14, 1975]

§ 1-18.705-5 Subcontracts.

The contracting officer shall obtain a list of all subcontracts, together with a description of the work to be performed thereunder. This list will be useful in obtaining compliance with the requirements for submission of payrolls by the contractor and subcontractors.

§ 1-18.705-6 Payrolls and statements.

(a) *Submission.* Within 7 calendar days after the regular payment date of the payroll week covered, the contractor is required to submit, or cause to be submitted for himself and his subcontractors (1) copies of weekly payrolls in compliance with the clause set forth in § 1-18.703-1(d), and (2) weekly statements of compliance as required by the Copeland Regulations (29 CFR Part 3) incorporated in the contract by the clause set forth in § 1-18.703-1(e) (see 29 CFR 3.3 for form of weekly statement of compliance).

(b) *Examination.* The executive agency concerned shall make such examination of the payrolls and statements as may be necessary to insure compliance with contract, statutory, and regulatory requirements. Particular attention should be given to the correctness of classifications and disproportionate employment of laborers, helpers, apprentices, or trainees to journeymen.

(c) *Preservation.* Unless specifically excepted by the Department of Labor, payrolls and statements shall be preserved by the executive agency concerned for a period of 3 years from the date of completion of the contract and shall be produced at the request of the

Secretary of Labor at any time during such period.

§ 1-18.705-7 Posting wage determinations.

The contracting officer shall ascertain that a copy of the wage determination is kept posted at the site of the work in a prominent place where it can be easily seen by the workers.

§ 1-18.705-8 Investigations.

(a) *Regular investigations.* The executive agency concerned shall make such investigations as may be necessary to insure compliance with contract, statutory, and regulatory requirements as follows:

(1) Contracts of 6 months or less duration shall be investigated before final payment is made, if feasible.

(2) Contracts of more than 6 months duration shall be investigated with such frequency as may be necessary to insure compliance. The investigations shall include interviews of employees on a sampling basis.

(b) *Special investigations.* Special investigations in detail shall be made when required by complaints or other evidence of violations. Complaints of violations shall be given priority.

(c) *Confidential nature of statements.* When oral or written statements are taken from employees during regular or special investigations they shall be treated as confidential and shall not be disclosed to the employer without the written consent of the employee.

§ 1-18.705-9 Suspensions and deductions of contract payments.[1]

When wage underpayments are found, the contractor shall be requested to make, or cause to be made, restitution to the employees and/or to plans, funds, or programs for any type of fringe benefits required by the applicable wage determination. If the contractor or subcontractor fails or refuses to pay all or any part of the wages due the employees, the contracting officer shall withhold from payments due the contractor an amount equal to the estimated underpayments, as well as any estimated liquidated damages due under the Contract Work Hours and Safety Standards Act. If wage underpayments continue, or the failure or refusal to make restitution appears continuing or willful, or if the contractor fails or refuses to comply with any other contract, statutory, or regulatory requirements, the contracting officer may suspend all contract payments to the contractor until the violations have ceased. If restitution has not been made prior to final payment under the contract, the contracting officer shall submit with the contractor's payment voucher or vouchers a Standard Form 1093, Schedule of Withholdings Under the Davis-Bacon Act, and a statement of the amounts to be withheld for underpayment of wages and liquidated damages pursuant to the Contract Work Hours and Safety Standards Act. These amounts shall be deducted from payments under the contract and shall be disposed of in accordance with agency procedures. Timely action to withhold for underpayments is encouraged by the General Accounting Office.

§ 1-18.705-10 Reports.[1]

(a) *Semiannual reports.* Each agency shall furnish to the Department of Labor by July 31 and January 31 of each calendar year semiannual reports on compliance with and enforcement of the labor standards provisions of the Davis-Bacon Act and its related acts and the Contract Work Hours and Safety Standards Act covering the periods of January 1 through June 30 and July 1 through December 31, respectively. Such reports shall be prepared in the manner prescribed in Department of Labor circular memoranda.

(b) *Reports of violations.* (1) No report need be made when the underpayments (i) total less than $500, (ii) are nonwillful, (iii) restitution has been effected, and (iv) future compliance has been assured, except where the investigation was expressly requested by the Department of Labor. In the latter case, the investigating agency shall submit a factual summary report in accordance with 29 CFR 5.7(a)(1).

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[1] See Temporary Regulation 70 in the appendix to Chapter 1 for temporary changes to § 1-18.705-9.

[1] See Temporary Regulation 70 in the appendix to Chapter 1 for temporary changes to § 1-18.705-10.

(2) For all other such underpayments the agency shall furnish to the Department of Labor, as soon as practicable, a detailed enforcement report. Such reports shall be prepared in accordance with 29 CFR 5.7(a)(2).

(3) Where there is substantial evidence that violations are willful and in breach of the provisions of section 1001 of Title 18, United States Code, or other criminal statute, the matter shall be forwarded to the Attorney General of the United States for prosecution and the Secretary of Labor shall be informed of such action.

§ 1-18.705-11 Contract terminations.

Whenever a contract is terminated for violation of the labor standards provisions, a report shall be submitted by the agency concerned to the Secretary of Labor and the Comptroller General. The report shall include the name and address of the terminated contractor or subcontractor, the name and address of the contractor or subcontractor who is to complete the work, the amount and number of the latter's contract, and a description of the work thereunder.

§ 1-18.705-12 Cooperation with the Department of Labor.

The contracting agency concerned shall cooperate with representatives of the Department of Labor in the inspection of records, interviews with workers, and all other aspects of investigations undertaken by the Department of Labor. When requested, the contracting agencies shall furnish to the Secretary of Labor any available information with respect to contractors, subcontractors, their contracts, and the nature of the contract work.

§ 1-18.705-13 Review of recommendations for an appropriate adjustment in liquidated damages under the Contract Work Hours and Safety Standards Act.[1]

Whenever the head of an agency finds that a sum of liquidated damages administratively determined to be due under section 104(a) of the Contract Work Hours and Safety Standards Act is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Contract Work Hours and Safety Standards Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, he may (a) make an appropriate adjustment in, or release the contractor or subcontractor of liability for, such liquidated damages where the amount of the damages is $100 or less, or (b) make recommendations for adjustment or relief to the Secretary of Labor where the amount of the damages is in excess of $100, as provided in 29 CFR 5.8.

§ 1-18.706 Disposition of disputes arising out of construction contract labor standards enforcement.

The areas of possible differences of opinion between contracting officers and contractors in construction contract labor standards enforcement include misclassification of workers, hours of work, wage rates and payment, withholding practices, and the applicability of the labor standards provisions under varying circumstances. For the most part, these are settled administratively by the agency concerned. If necessary, such differences may be settled with assistance from the Department of Labor, without references to the Disputes clause of the construction contract. Those disagreements which cannot be settled administratively by the agency shall be subject to the Disputes clause, except for disputes involving the meaning of classifications, wage rates contained in the wage determination of the Secretary of Labor, or the applicability of contract labor provisions.

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[1] See Temporary Regulation 70 in the appendix to Chapter 1 for temporary changes to § 1-18.705-13.

These matters shall be referred to the Secretary of Labor for an opinion, in accordance with 29 CFR 5.12, with sufficient supporting data to explain both sides of the dispute. No final decision on these matters shall be made by the contracting officer pursuant to the Disputes clause. The opinion obtained shall be made a part of the contract file and shall be applied (a) in the investigation of the case, and (b) in the computation of wage underpayments. The contractor will be furnished a copy of the opinion with advice that if aggrieved therewith he may appeal to the Wage Appeals Board of the Department of Labor in accordance with 29 CFR Part 7.

Subpart 1-18.8—Termination of Construction Contracts

§ 1-18.800 Scope.

This subpart sets forth policies and procedures regarding the termination of contracts for the convenience of the Government or for default which supplement the policies and procedures in Part 1-8.

§ 1-18.801 Definitions.

See § 1-8.101. As used in this subpart, the following terms have the meanings set forth below.

(a) "Construction equipment" means automotive vehicles, earth movers, cranes, batching plants, crushers, pavers, mixers, generators, compressors, pumps, drills, welders, forms, and other items of equipment (other than hand tools) used or capable of being used in construction work.

(b) "Terminated portion of the contract" with respect to a contract which has been completely terminated for the convenience of the Government means the entire contract, notwithstanding the completion of, and payment for, individual items of work prior to termination (see § 1-18.802-4).

§ 1-18.802 Termination for convenience of the Government.

See Subpart 1-8.2 for general principles and procedures applicable to all terminations for the convenience of the Government, Subpart 1-8.3 for general principles and procedures applicable to termination of fixed-price contracts for convenience, and Subpart 1-8.4 for general principles and procedures applicable to termination of cost-reimbursement contracts for convenience.

§ 1-18.802-1 Use of clauses.

Use of a clause providing for termination for convenience of the Government is required in every construction contract in excess of $10,000. Contracts which do not exceed $10,000 may provide for termination for convenience. The specific requirements regarding the use of such clauses are as follows:

(a) *Fixed-price construction contracts.* See § 1-8.700-2(a) (5) and (6) regarding the use of Termination for Convenience of the Government clauses.

(b) *Cost-reimbursement type construction contracts.* (1) See § 1-8.700-2(a)(3) regarding the use of Termination for Convenience of the Government clauses.

(2) See § 1-8.700-2(c) regarding the use of an Excusable Delays clause.

§ 1-18.802-2 Submission of settlement proposals.

The settlement proposal formats prescribed in §§ 1-8.802 and 1-8.803 may be used with such modifications as agencies consider necessary.

§ 1-18.802-3 Bases for settlement proposals.

See § 1-8.307-2.

(a) *Inventory basis.* The inventory basis of settlement is appropriate for use under the following circumstances:

(1) The partial termination of a construction contract; and

(2) The partial or complete termination of supply orders under any terminated construction contract.

(b) *Total cost basis.* The total cost basis of settlement shall be used in all cases where a construction contract is completely terminated. Line 10, section II of the format set forth in § 1-8.802-2, "Deduct—Finished Product Invoiced or To Be Invoiced" is not to be used. All progress and other payments shall be used to reduce the gross amount of the settlement.

§ 1-18.802-4 Completed items.

Work in place accepted by the Government under a fixed-price construction contract is not to be considered a completed item even though that work may have been paid for at prices set forth in the contract.

§ 1-18.802-5 Allowance for profit.

See § 1-8.303. In a construction contract, for the purpose of computing profit, that portion of settlements by the prime contractor with construction subcontractors for actual work in place at the job site, as distinguished from materials on hand and preparations made to complete the work, shall be considered compensation for services delivered to the prime contractor prior to the effective date of termination.

§ 1-18.802-6 Contractor inventory.

This subpart and Subpart 1-8.5 cover the disposition of all contractor inventory (§ 1-8.101(e)) generated under construction contracts. They apply to termination inventory and to any other inventory which is:

(a) Excess because of a contract modification; or

(b) Excess under a price revision type contract; and the cost thereof is included in the contractor's claim for an equitable adjustment or revision in price. They also apply to all property which is excess to the requirements of a cost-reimbursement type contract and include excess Government-furnished property under any type contract.

§ 1-18.802-7 Separate schedules.

See § 1-8.503-2. Construction equipment shall be submitted on separate inventory schedules.

§ 1-18.802-8 Return of materials to stock.

Materials taken from stock and shipped to the construction site shall be considered common items (§§ 1-8.101(b) and 1-8.503-5) and shall be returned to stock unless the contractor establishes that such items cannot be utilized without loss. Contractors shall not include in their settlement proposals the cost of any material so returned. Any costs in connection with the withdrawal, replacement, or transportation of such materials may be included as "Other Costs." (Section II, Item 8, and Section II, Item 5, respectively, of the formats set forth in §§ 1-8.802-1 and 1-8.802-2.)

§ 1-18.802-9 Allocability of contractor-acquired property on inventory schedules.

It is the responsibility of the contracting officer to determine that all property listed on inventory schedules is qualitatively and quantitatively allocable to the terminated contract or the terminated portion thereof, taking into consideration any work in place. Also, where applicable, the contracting officer must determine that the difference between the cost of allocable property on the inventory schedules and the total cost of property included in the settlement represents the cost of property incorporated in the work or consumed in the performance thereof.

§ 1-18.802-10 Contractor's certificate—property incorporated in work.

Each contractor whose settlement proposal includes the cost of property (materials, etc.) incorporated into the work shall execute a certificate to the effect that all property not accounted for on the inventory schedules has been incorporated into the work or consumed in the performance thereof.

§ 1-18.802-11 Inventory at construction site.

Every effort will be made by the contracting officer to relieve the contractor, as promptly as possible, of the responsibility for the preservation and protection of termination inventory located at the construction site. Property, including construction equipment, which is not to be included on inventory schedules shall be removed by the contractor as promptly as possible.

§ 1-18.802-12 Screening of property.

See § 1-8.505.

§ 1-18.802-13 Contracts for other departments or agencies.

Where a contract cites funds of a department or agency other than the department administering the contract, such department or agency shall have the first priority to all property listed on inventory schedules in accordance with any regulations issued by that department or agency.

§ 1-18.802-14 Transfer of property.

See § 101-43.315 of the Federal Property Management Regulations (Title 41, Code of Federal Regulations).

§ 1-18.802-15 Cleanup of site.

The contracting officer shall direct such action as will ensure the cleanup of the site, protection of serviceable materials, removal of hazards, and such other action as will leave a safe and healthful site.

§ 1-18.802-16 Final payment.

See § 1-8.212-2. Prior to presenting the final payment voucher to the disbursing officer, after termination action, the contracting officer shall ascertain whether there are any outstanding labor violations. If so, the contracting officer shall determine, pursuant to the criteria set forth in § 1-12.404-9, the amount to be withheld from the final payment voucher by reason of such violations.

§ 1-18.802-17 Adjustment of fee.

(a) The termination clauses in § 1-8.702 as changed by § 1-18.804-2 provide that the contracting officer and the contractor may agree upon, i.e., negotiate, the adjustment in fee necessitated by a partial or complete termination of the contract. Where the parties are unable to agree, the fee is to be adjusted as prescribed in paragraph (c) of such clauses.

(b) Where the contract has been terminated for the convenience of the Government, the percentage of completion basis, generally, constitutes a fair and equitable method of adjusting the fee. The percentage of completion basis refers to the contractor's total effort and not solely to the actual construction work. Generally, the effort of a contractor under a cost-reimbursement type construction contract can be segregated into factors such as: Mobilization including organization, use of finances, procurement and receipt of materials, placement of subcontracts, preparation of shop drawings, work in place performed by own forces, supervision of subcontractors' work, job administration, and demobilization. Each of the applicable factors will then be weighed, predicated upon a proper evaluation and sound judgment of the importance and difficulty of each factor under the circumstances of each individual contract. One method of weighting the applicable factors is to assign weighted values totaling 100. Next, the percentage of completion of each factor must be established based upon the specific facts of each contract. The application of the percentage of completion of each factor to the weighted value of each factor results, when totaled, in the overall percentage of contract completion. Such percentage of completion is then applied to the total contract fee or to the fee applicable to the terminated portion of the contract to arrive at the adjustment necessitated by the termination. Where agreement cannot be reached, the contracting officer shall determine the percentage of completion as above indicated. Where considered necessary, the contracting officer may consider and allow in the fee adjustment an amount to fairly compensate the contractor for work done, if any, in settling claims of subcontractors and disposing of termination inventory.

§ 1-18.803 Default termination of fixed-price construction contracts.

§ 1-18.803-1 Termination of the contractor's right to proceed.

Under contracts containing either of the Termination for Default-Damages for Delay-Time Extensions clauses set forth in § 1-8.709, the Government has the right, to the extent provided in such clauses, to terminate the contractor's right to proceed with the work or any separable part thereof, if the contractor does not prosecute the work required by the contract with such diligence as will ensure its completion, or fails to complete it, within the time specified in the contract or any extension thereof.

§ 1-18.803-2 Procedure in lieu of termination for default.

If, after due consideration, the contracting officer determines that termination is not in the best interest of the Government, although the contractor is in default, the contracting officer may permit the contractor to continue the work, and the contractor and his sureties shall be liable to the Government for liquidated damages, as specified in the contract, or if liquidated damages are not so specified, for any actual damages occasioned by the failure of the contractor to complete the work in accordance with the terms of the contract.

§ 1-18.803-3 Effect of termination for default.

If a contractor's right to proceed is terminated for default, the Government may take over and complete the work or cause it to be completed, and the contractor and his sureties shall be liable to the Government for any increased costs caused thereby. If the contract contains the clause set forth in § 1-8.709-1, the contractor and his sureties shall, in addition to increased costs in completing the work, be liable for liquidated damages if liquidated damages are provided in the contract, or for actual damages if liquidated damages are not so provided.

§ 1-18.803-4 Preliminary notice.

(a) Whenever a termination for default appears imminent, a written notification of that fact (not an actual notice of default) should be given by the contracting officer to the contractor and the surety.

(b) If requested by the surety, and agreed to by the contractor and his assignees, if any, arrangement may be made to have future checks mailed to the contractor in care of the surety. In such a case, the contractor must forward a written request to the contracting officer specifically directing a change in address for mailing of checks.

§ 1-18.803-5 Procedure in case of default.

(a) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(1) The provisions of the contract and applicable laws and regulations;

(2) The specific failure of the contractor and excuses, if any, made by the contractor for such failure (see (b) and (c) of § 1-8.601 as to the result of termination for default where causes of delay are subsequently found to have been excusable);

(3) The period of time which would be required for the Government or another contractor to complete the work as compared to the time required for completion by the delinquent contractor;

(4) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments;

(5) The availability of funds to finance the increased cost to complete, to the extent that such costs may not be covered by surety protection, and the availability of funds to finance termination costs should it subsequently be determined that the delay was excusable; and

(6) Any other pertinent facts and circumstances.

(b) If the contracting officer determines that the contractor's failure to perform arises from causes which are excusable under the terms of the contract, the contracting officer must extend the time for completing the work under either of the clauses in § 1-8.709, and may not terminate the contractor's right to proceed nor charge the contractor with liquidated damages (or if no liquidated damages, then actual damages) because of any delays occasioned by such causes. However, if the Government must secure performance before the extended completion date, it may consider the following alternatives:

(1) Amendment of the contract to provide for acceleration of the work to meet the Government's needs; or

(2) If amendment to provide for acceleration cannot be accomplished:

(i) Termination for the convenience of the Government if such a clause is included, or, if not included, amendment of the contract so as to include it; or

(ii) Where termination cannot be made under (i), unilateral termination.

(c) If the contracting officer determines that termination for default is in the best interest of the Government, he shall promptly send a written notice to the contractor terminating his right to proceed. The notice shall:

(1) Set forth the contract number and date;

(2) Describe the act or omissions, and the extent of the resultant delay, constituting the default;

(3) State that the contractor's right to proceed further with performance of the contract (or of a specified portion of the contract) is terminated;

(4) State that the Government may cause the contract to be completed and that the contractor will be held liable for any increased costs;

(5) State that the Government reserves all rights and remedies provided by law or under the contract, in addition to charging increased costs;

(6) State that the notice constitutes a decision, pursuant to the Disputes clause, that the contractor is in default as specified and that the contracting officer has determined that the delay is not excusable; and

(7) State that the contractor has the right to appeal as specified in the Disputes clause (see § 1-1.318).

(d) The same distribution shall be made of the termination notice as was made of the contract. In addition, a copy shall be furnished to the surety at the same time the notice is furnished to the contractor, together with a request that the surety advise whether it desires to complete the work, and the procuring activity fiscal office shall be advised to withhold further payments under the terminated contract pending additional instructions which shall be given when sufficient information is available.

(e) Promptly after issuance of the termination notice, the contracting officer shall determine the manner in which the work is to be completed and whether the materials, appliances, and plant which are on the site will be needed.

§ 1-18.803-6 Dealings with surety-takeover agreements.

(a) By reason of the surety's liability for damages resulting from the contractor's default, the surety has certain rights and interests in connection with the completion of the contract work and the application of the undisbursed funds available therefor. An expenditure in excess of the amount reasonably necessary for completion or a diversion of funds to other use may result in reducing the surety's liability. Because of such interests of the surety, proposals by the surety concerning the completion of the work should be given due consideration, and the decision as to the action to be taken shall be made on the basis of the best interest of the Government, including the possible effect of such action upon the Government's rights against the surety.

(b) Where the surety desires to complete the contract work, completion by the surety should normally be permitted unless the contracting officer has reason to believe that the persons, firms, or corporations by whom the surety proposes to have the work done are so incompetent or unqualified that the interests of the Government would be substantially prejudiced by their efforts.

(c) Because of the possibility of conflicting claims to unpaid prior earnings (retained percentages or amounts representing unpaid progress estimates) of the defaulting contractor, the surety may condition its offer of completion upon the execution by the Government of a "takeover" agreement fixing the surety's rights to payment from such funds. In that event, the contracting officer may in his discretion (but not before the effective date of termination) enter into a written agreement with the surety. Further, consideration should be given to having the agreement include both the surety and the defaulting contractor in order to eliminate any disagreement as to the contractor's residual rights, such as claims to unpaid prior earnings. The agreement shall provide that the surety will undertake to complete the work required by the contract in accordance with all the terms and conditions of the contract, and that the Government will pay the surety in the manner provided by the contract, but not in excess of the surety's costs and expenses, the balance of the contract price unpaid at the time of default; subject, however, to the following conditions.

(1) Any unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished prior to termination, shall be subject to claims by the Government against the contractor, except to the extent that the amount thereof may be required to pay to the completing surety its actual costs and expenses incurred in the completion of the work exclusive of its payments and obligations under the payment bond given in connection with the contract.

(2) Such agreement shall not waive or release the Government's right to liquidated damages for delays in completion of the work, except to the extent that such delays may be excused under the provisions of the contract.

(3) If the contract proceeds have been assigned to a financing institution, the surety may not be paid from retained percentage or amounts representing unpaid progress estimates earned by or payable to the contractor unless the assignee shall consent in writing to such payment.

(4) In no event shall the surety be entitled to be paid any amount in excess of its total expenditures necessarily made in completing the work and discharging its liabilities under the payment bond of the defaulting contractor. Furthermore, payments to the surety to reimburse it for discharging its liabilities under the payment bond of the defaulting contractor shall be only on authority of (i) mutual agreement between the Government, the defaulting contractor, and the surety, (ii) determination of the Comptroller General as to payee and amount, or (iii) order of a court of competent jurisdiction.

§ 1-18.803-7 Completion by another contractor.

Where the surety does not complete performance of the contract, the contracting officer normally will complete the performance of work by awarding a new contract based on the same plans and specifications. Although the legal requirements with respect to formal advertising are inapplicable, such contract shall be awarded on the basis of formal advertising, except where there is good reason to negotiate. The contracting officer must use reasonable diligence to obtain the lowest price available for completion.

§ 1-18.803-8 Documentation in contract file.

In all cases where a contractor's right to proceed is terminated for default or where the procedure authorized by § 1-18.803-2 is followed, the contract file shall be well documented to explain fully the reasons for the action taken.

§ 1-18.803-9 Liquidation of liability.

In accordance with the provisions of the contract, the contractor and his surety are liable to the Government for resulting damages except those administrative costs which are necessary for, and directly assignable to, completing the work following such termination and which would not have been required had termination not been necessary. All retained percentages of progress payments previously made to the contractor and any progress payments due for work completed prior to the termination of the right to proceed shall be used for the purpose of liquidating the liability of the contractor and his surety to the Government for such damages. Where the retained and unpaid amounts are insufficient to liquidate such liability, steps shall be taken to recover the additional sum from the contractor and his surety.

[42 FR 56740, Oct. 28, 1977]

§ 1-18.803-10 Withholding for labor violations.

Any amounts necessary to pay laborer and mechanic wages due under the contract shall be withheld until evidence of proper payment is given, or such amounts shall be transferred to the Comptroller General (see § 1-12.404-9).

§ 1-18.804 Use of termination for default clauses.

(a) *Fixed-price construction contracts.* See § 1-8.700-2(b)(4) regarding the use of a default clause in contracts estimated to exceed $10,000, and § 1-8.700-2(b)(5) regarding the use of a default clause in contracts estimated not to exceed $10,000.

(b) *Cost-reimbursement type construction contracts.* See § 1-8.700-2(b)(2) regarding the use of a default clause.

§ 1-18.805 Formats of notices of termination for convenience of construction contracts.

§ 1-18.805-1 Telegraphic notices.

See formats in § 1-8.801-1.

§ 1-18.805-2 Letter notices.

See formats in § 1-8.801-2.

Subpart 1-18.9—[Reserved]

Subpart 1-18.10—Bonds and Insurance

§ 1-18.1000 Scope.

This subpart sets forth requirements for bid guarantees, bonds, and insurance in construction contracts.

§ 1-18.1001 Bid guarantees.

Subpart 1-10.1 shall govern bid guarantees for construction contracts, insofar as applicable. Whenever performance and payment bonds are to be required in connection with construction contracts, the invitation for bids or request for proposals shall require the submission of bid guarantees meeting the requirements of that subpart.

§ 1-18.1002 Performance bonds in connection with construction contracts.

Furnishing of performance bonds for construction contracts is governed by § 1-10.104-1. Where required, such bonds shall be furnished prior to issuance of notice to proceed with the work.

§ 1-18.1003 Payment bonds in connection with construction contracts.

Furnishing of payment bonds in connection with construction contracts is governed by § 1-10.105-1. Where required, such bonds shall be furnished prior to issuance of notice to proceed with the work.

§ 1-18.1004 Furnishing information to subcontractors and suppliers.

See § 1-10.105-3.

§ 1-18.1005 Default procedures.

See § 1-18.803.

§ 1-18.1006 Consent of surety.

See § 1-10.205.

§ 1-18.1007 Insurance.

See Subparts 1-10.3, 1-10.4, and 1-10.5.

Subpart 1-18.11—Federal, State, and Local Taxes

§ 1-18.1101 Cross-reference.

See Part 1-11.

PART 1-19—TRANSPORTATION

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TESTIMONY OF
EDWARD K. THOMAS, PRESIDENT
CENTRAL COUNCIL OF THE
TLINGIT AND HAIDA TRIBES OF ALASKA
BEFORE THE
SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
HEARING ON P.L. 100-472, AMENDMENTS TO THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

June 9, 1989

Greetings from the great state of Alaska. My name is Edward K. Thomas. I am the elected President of the Central Council of the Tlingit and Haida Indian Tribes of Alaska. Thank you for inviting me to testify on these amendments.

I must first commend Congress for passing P.L. 100-472. Proper implementation of these amendments will clarify the role of the Bureau of Indian Affairs (BIA) in contracting with Indian tribes for federal programs designed to benefit Indians. These amendments will also make it a little easier for tribes to continue to contract by reducing unnecessary red tape and by stabilizing the funding from tribal administrative costs.

Moreover, the Demonstration Project authorized by Title III is the next logical step in the important process of self-determination furthered by the contracting amendments. On February 3, 1988, when you, Mr. Chairman, joined with Senator Evans to introduce the predecessor to Title III, you recalled to your Senate colleagues the earlier introduction of Senate Concurrent Resolution 76 on September 16, 1987. As you noted, that Resolution reaffirms the continuing government-to-government relationship between Indian tribes and the United States. I am so grateful that Senate Concurrent Resolution 76 passed the Senate and an identical resolution, House Concurrent Resolution 331, passed the House. You called the resolution, developed in close cooperation with some of the tribes participating in the Demonstration Project, an important step in our mutual effort to clarify the relationship between tribes and the United States so that it may conform more nearly to the quality of the relationship that existed at the time of the signing of the U. S. Constitution. You said that as tribal governments did then, they should today, like other governments, determine for themselves how best to provide for their citizens, and expressed the importance of exploring practical ways of implementing the concepts contained in Senate Concurrent Resolution 76. You said that if the Demonstration Project could further those concepts, it will have been worth the effort, and suggested that it may take P.L. 93-638 to the next evolutionary stage.

REGULATION DEVELOPMENT/IMPLEMENTATION SCHEDULE

I think that Congress should make every effort to stick by the original time frames in the development and implementation of regulations. I realize that some tribes had trouble with these ambitious time frames; however, I feel strongly that there are many positive features in these amendments that could be implemented without much fanfare. For example, the sections on funding and indirect costs could be implemented easily, with few regulations, and some very positive solutions to some very serious tribal problems would be the result of such implementation of the law before the next fiscal year begins. I agree that there are some complicated sections of the law that would require more effort and input from tribes and BIA administration, but I do not feel the entire law should be held up on these few sections.

Currently, it is being suggested by the Department of Health and Human Services (DHHS), BIA and the Steering Committee that the notice of proposed rulemaking (NPRM) begin joint review and clearance by Departments (DHHS and DOI) and OMB by September 29 and complete it by January 1, 1990. I propose this review on funding and indirect parts of the proposed regulations begin now and be completed by the end of September to allow full utilization of these sections for fiscal year 1990.

CONGRESSIONAL OVERSIGHT IN REGULATION IMPLEMENTATION

I feel that Congress needs to actively coordinate the finalization of the regulations. I must commend the BIA and IHS administration for their cooperative attitude throughout the initial stages of the development of regulations. However, as we get closer to the final product, it is becoming harder and harder to come to a consensus on issues and as the administration gets frustrated, the finalization of these regulations gets delayed more frequently.

Further, with the change in Administration, there are some possibilities that changes in key personnel may result in more delays and changes in the position of the Administration on draft regulations done in consultation with tribal representatives.

IPS (Indian Priority System)

I had the opportunity to serve on the Juneau Area Office (JAO) Task Force on the IPS. This Task Force came up with some very good suggestions on how we could improve this system to make it more responsive to tribal needs and priorities. I have not seen these recommendations converted to BIA or IHS policies nor suggestions for new regulations. I recommend that Congress take whatever steps are necessary to get these recommendations implemented before the next IPS processes begin.

TITLE III, SELF-GOVERNANCE PROJECT

The Self-Governance Demonstration Project authorized by Title III of P.L. 100-472 provides the opportunity for a limited number of tribes to investigate and implement new ways to manage federal funds appropriated to benefit Indians. Over the next few years of the Demonstration Project, we will take part in what may well become a major restructuring of the relationship between Indian tribes and the federal government. In the short term, we must deal with the specifics of implementing a pilot program. In the long-term, what we learn in these first few years may pave the way for a permanent change in the way the federal government accomplishes its trust and other responsibilities.

Although Title III authorizes tribes to redesign programs in accordance with their own priorities and criteria, and to reallocate funds within and among programs, the goal which our tribe is pursuing during the planning phase of our Self-Governance Grant is the reduction of federal administrative costs and the transfer of the savings into direct programs. We have concentrated on redirecting funds to needy tribal members and have not focused, as have some Self-governance Tribes, on a new delivery mechanism, the consolidated funding agreement.

In pursuit of that goal, we are developing a management plan for the Bureau of Indian Affairs Juneau Area Office and Southeast Agency in Juneau, Alaska, which includes abolishment of the Agency and converting the savings into program dollars. We are also researching other projects and programs (banded or unbanded) within the Juneau Area that are of questionable or of little benefit to Alaska Natives and can be reduced or abolished with minimum impact on the Bureau's ability to carry out its trust responsibilities to Alaska Natives. Our plan will convert those funds to other more beneficial programs.

The opportunities to research potential obstacles in reducing a layer or more of bureaucracy in the BIA has been very positive for my tribe.

FINANCIAL ANALYSIS: The project has provided us with resources to collect financial data on the "central," "area," and "agency" levels of the BIA. Although on the surface this may seem like a fairly simple and straight-forward task, it has taken a lot of effort to get this data, and still it appears to me that this information is incomplete. The information that we have received shows us that a tremendous amount of resources (money) is being spent ineffectively and is not being directed at the priority needs of the people within our Area. This information also shows us that line-items such as technical assistance and training funds are not getting directly to the tribes to help them better manage their contracts with the federal government.

LEGAL AND HISTORICAL ANALYSIS: We were able to analyze the potential legal impact on federal-tribal relationships of eliminating layers of federal bureaucracy. We also examined the trust implications of the redesign of federal programs by some tribes, which would include the reduction of comprehensive federal controls through waiver of federal regulations and amendment of federal legislation. One of the most frequent concerns expressed by tribal representatives has been the concern of loosing the government-to-government relationship with the federal government that federally recognized tribes currently enjoy, and of wiping out the trust responsibility; therefore, it was critical that such an analysis be completed.

Our research concludes that it is possible to eliminate various levels of federal government bureaucracy and controls without deteriorating tribal/federal government relationships.

One of the obstacles we have encountered during the first year of planning is a concerted effort by the Bureau, with the aid of the Solicitor's Office, to terminate our tribe. This effort undoubtedly is the response to our goal of eliminating layers of BIA bureaucracy, and fits right in with the larger, general effort to deny tribal existence in Alaska. It is appalling that the research of the history of my tribe revealed that in the early 40's while defending Native fishing rights in my state, the Interior Solicitor's Office, which now seeks to deny our existence, presented a thorough legal position as to why there are tribes in Alaska, using my tribe as an example of how tribal governments function within the state (at that time, territory). This information and other documentation of the history of tribal governments in our region were combined into a paper entitled "Tlingit and Haida Tribal Status," which is attached for the record.

This research on the history of our tribe has also been of benefit as various opponents of tribalism have challenged Alaska tribal existence this past year. The Governor of Alaska is saying on one hand that there are "some forms of tribal governments" in Alaska; and on the other hand, the Governor's Washington, D.C. liaison consistently resists any BIA or congressional activities that would clear up the status of tribes in Alaska by simply publishing them in the Federal Register without any tribalism disclaimer. The Department of the Interior is illegally placing disclaimer language in its Federal Register publication of the list of Alaska tribes, for Title 25 of the Code of Federal Regulations provides that Interior simply publish a list of "all Indian tribes...." Their own regulations do not authorize them to tamper with or in any other way arbitrarily establish Indian policy that terminates tribal relationships with the federal government.

The legal trust issues that arise under the Self-Governance Project center mainly on how to reconcile the federal government's obligations to protect the welfare of Indian tribes and Indians with the project's purpose of assuring tribes' control over their own destiny.

Our research first explored in detail the nature of the responsibilities imposed on the federal government by the trust duty. Then we assessed the implications of the trust doctrine for the Self-Governance Project, and made recommendations as to how to proceed during the course of the Project in preparation for permanent authorizing legislation.

REGULATION DEVELOPMENT ANALYSIS: Being one of the original ten tribes involved in the Demonstration Project has definitely provided me with the opportunity to work with other tribal groups and federal agencies in the development of the regulations for P.L. 100-472. For that, we are grateful. We were involved because many were interested in the activities and experiences of the "Demonstration Tribes" as it related to the problems and concerns we had as we looked at alternative ways to run federal contracts and grants and to see if we had suggested improvements to the regulations. As I have stated in other testimony on this subject, my primary concern is to make every effort to change anything that would get more of the congressional appropriations to needy tribal people.

Although the Self-Governance Demonstration Tribes have developed draft regulations, they are stalled in the general P.L. 100-472 regulatory process. Because the Demonstration Project is separate, its regulations could be published at once. We have been able to work with BIA Self-Governance Project staff on these regulations; however, we fear that the resistance of BIA officials to the project will result in their proposing a regulatory maze designed to inhibit tribal redesign of programs and reallocation of funds. It has been necessary time and again to get the help of this Committee and the House Interior Appropriations Subcommittee to preserve the funding and flexibility for administration of the Demonstration Project. For that assistance we are grateful.

INDIRECT COSTS: The amendments to P.L. 100-472, the proposed regulations, and the request for proposal (RFP) are silent on the issue of indirect costs for the Demonstration Project. The BIA has decided not to allow indirect cost allowances for the Demonstration Grants. P.L. 100-472 stresses the importance of the tribes getting full indirect cost funding. OMB Circular A-87 contemplates full indirect costs for all grants and contracts administered by all units of government, including tribes, covered by A-87. These projects should be eligible for indirect cost funds so that participating tribes don't endanger their cost pools as a result of the Demonstration Grants.

And, while you are considering the issue of indirect costs, please note that the practice of excluding HIP (Housing Improvement Program) and ICWA (Indian Child Welfare Act) from the programs that tribes are able to get indirect costs for creates a situation where tribes must subsidize these federal programs in order to administer them on behalf of their people. I do not think this is right! I recommend that all grants and programs that are contractible by Indian tribes be subject to tribal indirect cost assessments.

On balance, the Demonstration Project has been a very positive tool for my tribe to analyze approaches to improve its contractual arrangements with the federal government. We hope to have our plan implemented by the end of this calendar year. We need your support for our goal.

Generally, I think it is fair to say that at this time the Self-Governance Demonstration Tribes expect that the planning and experience which takes place pursuant to Title III will result in the enactment of permanent authorizing legislation restructuring the relationship between tribes and the federal government. That legislation will probably have to address the federal government's trust and other responsibilities directly. As we work through the next few years of the pilot project, we will prepare ourselves for that day in part by understanding in detail the existing statutory, regulatory, and judicial state of the trust and other duties of the federal government and will probably design a new "relationship" that 1) defines clearly by statute, and in ways more beneficial to tribes, the specific standards for management of trust resources and the obligations imposed on the government by the trust; 2) ensures tribes the right of self-governance in each area of the government-to-government and trust relationships; 3) identifies the statutory and regulatory changes necessary to reflect that new definition and to impose enforceable obligations on the federal government; 4) streamlines the federal bureaucracy and establishes the financial and resource base to implement items 1, 2, and 3; and 5) commits the Congress to a continuing appropriation to accomplish the goals of the new Indian policy.

I recommend that more tribes be allowed to participate in demonstration projects that are designed to improve the efficiency of program delivery to Indian people. This is a good approach. New tribes should be into these projects for at least two (2) years automatically without having to compete against other tribes for second-year funding. If changes are going to be made, there must be a commitment to this change; otherwise, this is a waste of time and money.

LIABILITY INSURANCE

High liability insurance and other costs continue to plague Indian contractors. These high costs seriously diminish the effectiveness of tribes to maximize benefit to tribal members.

P.L. 100-472 provides an excellent opportunity for the federal government and tribal governments to work together to reduce the burden of high insurance costs relative to managing government contracts. If the federal government were to research and publish lists of insurance companies that have lower liability insurance rates to tribal governments and explore tribal government insurance cooperatives and tribal government self-insurance options, it may encourage insurance companies to not only reduce rates to Indian tribes, but to form partnerships with Indian tribes to have Indian-controlled insurance companies to service Indian tribes.

This past year, I requested that the law firm representing my tribe report to me on possible cooperative arrangements that would eventually reduce premiums to tribal contractors. Our tribe is very interested in joint ventures with other tribes and insurance companies. One such example I fully support is the effort to develop an Indian-owned risk management insurance company like Double Eagle, about which you will hear later.

Further, I think that the BIA should be asked to sponsor insurance reducing workshops, in conjunction with national Indian conferences, where insurance companies who have reasonable rates and good coverage would be invited to make presentations on good approaches to liability insurance. As it is now, even though the amendments provide an ideal opportunity, favorable and competitive insurance companies and tribes have a difficult time getting together because it is unclear who will cover the costs.

Thank you, Mr. Chairman, for the privilege of being here today.

PREPARED STATEMENT OF LAURENCE KENMILLE

INTRODUCTION

The Confederated Salish and Kootenai Tribes are one of the original ten Self-Governance Demonstration Project tribes. The purpose of this document is to provide testimony to the Senate Select Committee on Indian Affairs, as requested by the Honorable Daniel Inouye, Chairman. This testimony includes three major sections.

- Accomplishments of the Confederated Tribes in the Self-Governance Demonstration Project
- Self-Governance must move beyond the BIA's inadequate and misleading fiscal policy
- Recommendations to Congress

This report is not intended to rehash the various problems and constraints of dealing with the Bureau of Indian Affairs (BIA) but to take the "high road" with respect to specific recommendations to Congress that will enable the Tribes to realize the full potential of the Self-Governance initiative.

The Confederated Tribes approach Self-Governance under the following premises:

1. The concept of Self-Governance should be interpreted broadly to mean a government to government relationship. A more detailed tribal definition of Self-Governance is supplied in Attachment A.

2. Self-Governance should be a "transfer model" that is driven by formally documented needs and policies, not just a shift of narrowly defined and limited BIA budget "scraps". This model calls for a careful assessment of tribal versus BIA (and other federal agency) investment within a coherent structure of services. Attachment B summarizes the conflicting expectations of the BIA versus the Confederated tribes in this matter.

3. Self-Governance should be implemented within a consolidated planning and budgeting system that calls for full justification and accountability for programs, services and expenditures. Such a system will serve as the reporting and monetory vehicle to Congress.

ACCOMPLISHMENTS

Since May of 1988 the Confederated Tribes have approached the Demonstration Project with a significant commitment of Tribal resources and a philosophy of balancing vision and pragmatism. Accomplishments to date include the following:

1. Self-Governance Assessment and Strategies Report (October 1988). This sixty (60) page report defines the context for Self-Governance, evaluates five (5) major strategy alternatives, contains an assessment of BIA Agency and Area Office funding, a review of tribal self-governance management

capacity, a generalized needs framework and analysis of eleven (11) issues and obstacles confronting Self-Governance.

2. Tribal Council Policy Reviews and Strategy Determination. The Tribal Council has conducted four (4) half-day to full day policy reviews devoted to Self-Governance project funding and recommendations. These have resulted in adopting a multi-year Self-Governance strategy.

3. Report to Congress (February, 1989) - a 36 page report was prepared for the Senate Select Committee on Indian Affairs. This report contained specific recommendations to Congress, highlights of the Tribes' adopted strategy and selected exhibits of Demonstration Project fundings.

4. Consolidated Budget Start-Up - consolidated Tribal/BIA budget process is central to the Confederated Tribes Self-Governance strategy. The Tribes have already established a two year detailed approach and have begun restructuring the Tribes's budget into a program budget to be delivered to the Tribal Council on June 30, 1989. The program budget accounts for all revenue sources (tribal general fund, federal, state and other) by program service category and sets the stage for consolidating the BIA budget into the process in Spring of 1990. The fully consolidated budget will match all BIA programs to tribal needs and program objectives.

5. Consolidated budget system M.O.U. The Tribes have drafted a memorandum of understanding between the Tribes and BIA for

staged implementation of the consolidated budget. This M.O.U. will be incorporated into the Self-Governance Program "Compact".

6. Program Restructuring and Redesign - the Tribes have restructured the Natural Resources Department to facilitate integration of BIA land with trust related services into the tribes program structure. The tribes are also in the process of restructuring and redesigning all 638 contracted services to create a more coherent and integrated set of services.

7. Integrated Resource Management Plan - the tribes have begun a comprehensive land and natural resource plan, involving a coordinated tribal and BIA planning team. The plan, covering all lands and resources, will be completed in 1990 and the initial volume will be used in the FY 1991 Consolidated budget to establish needs and priorities for all tribal and BIA funded land and trust services. This planning process, a $200,000 project, is not being funded by the BIA.

SELF-GOVERNANCE MUST MOVE BEYOND THE BIA'S INADEQUATE AND MISLEADING FISCAL POLICY

The Confederated Tribes are forging ahead with its Self-Governance approach with a coordinated combination of long range planning, program restructuring/redesign and consolidated program budgeting. These tools are essential to effective "transfer" of BIA budgets and program authority. The Tribes feel very strongly that the BIA budget and services should fit within a tribal policy framework and not the other way around.

Congress must realize that the BIA so-called Indian Priority System (IPS) budgeting perpetuates a fraud, giving the illusion of participation and priority setting without the substance of participation and without any documented rationale for program services and budget levels. In the BIA IPS, total dollars will always be limited to incremental changes without the benefit of any assessment of priorities or attention to levels of need. The BIA IPS is a device for budgeting for scraps on the margin of annual ceilings and cut-backs.

For this reason the Confederated Tribes are moving ahead with integrated planning and consolidated budgeting that matches tribal investment of general funds against BIA dwindling commitments, while forcing greater BIA accountability for all of its funds.

SELF-GOVERNANCE RECOMMENDATIONS TO CONGRESS

As an update to the initial set of recommendations in the Tribes February 8,1989 report to Congress, the Confederated Tribes present the following specific recommendations:

1. That Congress Interpret the Self-Governance Transfer Model Broadly. Self-Governance should include the transfer of capacity, technology, authority and a wide range of budgeted resources, not just the limited "scraps" of the IPS budget ceilings. Without a broader scope, the BIA will continue to

hide and reassign resources outside the reach of tribal planning or the harsh light of accountability.

2. That Congress Mandate BIA Participation in the Confederated Tribes (or other tribes) Consolidated Budgeting System - The budget approach calls for systematic annual identification and evaluation of all revenues (tribal, federal, other) and expenditures within a Tribal policy framework. It also requires a comparative review of Tribal vs. BIA investment in related services. Such a comparative assessment has already been completed by the Confederated Tribes in its first plan of the Demonstration Project.

3. That Congress Support the Tribes' Serving as the Lead Management Agency for Other Federal Funds that "Pass-Through" the BIA, When the Tribes Can Demonstrate Capacity to Serve in the Lead and Priority Setting Role - the BIA has not fulfilled its obligations in intergovernmental affairs nor has it provided full and timely information to the Tribes on other federal funds it manages to the benefit of the Flathead Indian Reservation. Again, the Consolidated Budget approach will require full justification and accountability for such funds.

4. That Congress Mandate, Within its Self-Governance Compact, Minimum Feasible Allocation to the Agency on Reservation Land of all Technical and Financial Resources That Are of Benefit to the Flathead Indian Reservation - Only at the field or direct tribal benefit level, can BIA resources with assistance be

properly monitored and evaluated/ and properly restructured to benefit Indian people and lands.

5. That Congress Require the BIA to Act in Compliance to and Conformance With Tribally Adopted Comprehensive Plans That Are Incorporated in the Self-Governance Compact. It is recognized that policies in such plans should not conflict with statutory regulatory mandates in order for the BIA to comply. This issue is especially important for tribal policy direction on trust functions in lands and natural resources. The Confederated Tribes feel very strongly that such an integrated or comprehensive plan will place the trust responsibility back into proper focus and provide a means for sorting out Tribal versus BIA responsibilities for land and Natural Resource management.

The Confederated Tribes, in submitting these recommendations, are asking for a signal from Congress on whether we are on the right track in Self-Governance strategy and approach. Each of the five recommendations is tangible and can be monitored on an annual basis for the Secretary's required report to Congress.

We are moving diligently to fulfill one side of the bargain in the Self-Governance challenge. However, we believe Self-Governance will fail if it is used as just another device to tinker with and temporarily capture BIA determined funding scraps. Self-Governance must be built on a firmer foundation of planning, budgeting with policy change or it will lose its value as a transfer model for more effective federal investment in Indian needs and capacity building.

ATTACHMENT A

SELF-GOVERNANCE CONCEPT

Definition

The Tribes interpret the concept of self-governance inclusively. Self-Governance means:

1. the institutional capacity of the Confederated Salish and Kootenai Tribes -- legal, fiscal, managerial and technical -- to plan, direct, implement and evaluate the performance of all governmental functions required:
    - o to respond to the public health and safety needs of our people;
    - o to create an environment which provides opportunities for personal development and for strengthening family and cultural values, and;
    - o to protect and develop responsibly the lands and resources of the Flathead Reservation;
2. recognition by Federal, state and local governments of the Tribes' authority to exercise these governmental powers and to enter into agreements with other governmental units within its own laws and the laws of the United States.

REQUIREMENTS	IMPLICATIONS
1. Government-to-Government Relationship	Beyond just BIA; Direct dealings with Congress, as needed.
2. Needs Based Funding	Systematic assessments; full direct and indirect costs.
3. Greater Tribal Policy Direction	BIA response to tribal priorities; increased BIA accountability.
4. BIA Direction Based on Tribal Plans and Goals	Tribal lead responsibility; BIA support to adopted tribal plans and priorities.
5. Maximum Allocation to Reservation Level	Reduce Area Office administration, technical assistance and residual services; more direct involvement with Tribes.
6. Multi-Year Commitment	Budget system sophistication; sufficient base to test program transfer and integrate into tribal plans.
7. Cost-Effective Takeover	No transfer to Tribes of underfunded or underperforming programs/functions.
8. Management Capacity Building	Reduce BIA administration; increase tribal administration and control systems.
9. BIA Residual Presence	BIA trust responsibility residual; BIA justification of other residual activities.
10. Tribal Assertion of Legal Interpretation	Federal/BIA interpretation of federal laws and regulations to facilitate new agreements and greater tribal policy/management direction.

ATTACHMENT B

CONFLICTING EXPECTATIONS

DIMENSION	BIA	CONFED. S-K TRIBES
Desired Outcome	Tribal flexibility to set priorities within BIA budget categories; "a new funding relationship."	Redefinition of the nature of the "government-to-government" relationship as well as the US "investment" in Tribal gov't.
Width of Focus	On "Program Agreement" package; in terms of funding only.	Broad focus on needs and on responsibilities and capacities of federal and Tribal governments/agencies.
Time Frame	Short-term; emphasis on quick development of Program Agreement.	Long-term perspective on future fed. and Tribal responsibilities and functions, and dev. of Tribal gov. capacity.
Resources Included	IPS "field program" Agency and Area funds only.	All federal and Tribal funds within a Tribally-defined integrated service framework ("program structure").
Administrative Responsibility	Agreement ends administrative responsibility for transferred programs.	CSKT provides policy direction but assumes admin. responsibility only if cost-effective.
Trust Responsibility	Responsibility to protect the trust requires Bureau to retain residual functions.	The entity best equipped to perform a trust function should do it (w/in statutory limits).
Nature of Relationship Changes	Self-Governance is a single transaction (the Program Agreement).	S-G involves multiple transactions (consol. budget process, program monitoring, negotiation of phased agreements...).
Standard of service	Tribes may define acceptable performance standards, since BIA was unable to meet or (often) define them.	Federal minimum standard must establish base resource requirements; BIA should report its performance against std.
Consolidated Budget Process	"Dollar-driven."	Policy- and Tribal priority-driven.
Information Required	Budget system oriented to fiscal inputs.	Decisions are based on Tribal needs, priorities, and actual services performed.
Accountability	To higher authority within the BIA or DoI.	To Tribes through budget hearings and monitoring, and to Congress through BIA/Tribal reports per PL 100-472 Title 3.

PREPARED STATEMENT OF THOMAS ACEVEDO

When Congress amended the Indian Self-Determination and Education Assistance Act in 1988 pursuant to P.L. 100-472, a unique opportunity was created in TITLE II of the amendments. In Section (c)(1) of Section 201, TITLE II, the amendments provide that in 1990 the Secretary would be responsible "for obtaining or providing liability insurance or equivalent coverage, on the most cost effective basis" for Indian Tribes carrying out contracts, grant agreements and cooperative agreements under the Act. Furthermore in (c)(2) of this same section the amendments provide that the Secretary in obtaining or providing such insurance coverage shall", to the greatest extent practicable, give preference to coverage underwritten by Indian-owned economic enterprises."

Indian Tribes generally speaking having not been directly in the insurance underwriting business before and inquired what these amendments were all about. Allen Parker, of this Committee's staff, at various regional conferences of Tribal organizations, earlier this year, gave briefings explaining the amendments. As a result of those briefings Tribal leaders became familiar with the amendments and also very interested in seizing the opportunity afforded by Congress in those amendments to become involved in insurance underwriting.

On March 20th of this year, at a meeting in Albuquerque attended by approximately sixty (60) Tribal leaders and interested person, discussions were held concerning the various possibilities and attendant problems in forming some type of Tribally controlled insurance company. As a consequence of those discussions nineteen individuals from the approximately sixty individuals in attendance volunteered to provide assistance toward forming an Indian insurance company. The volunteers were from Tribes throughout the United States.

Following the formation of this organizational committee, work commenced on developing the necessary business and legal framework for the formation of a risk management insurance company. From this work the company was chartered as Double Eagle Risk Management, Inc. under the laws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana. The Salish and Kootenai Tribes offered to charter the company just as the Red Lake Band of Chippewa Indians had done so for AMERIND Risk Management Corporation. AMERIND provides insurance to Indian Housing Authorities and was looked to by the incorporators of Double Eagle as a model for forming on Indian owned risk management company.

However, unlike AMERIND, Double Eagle does not have available to it a reserve capital pool so as to initially provide insurance coverage. AMERIND when it was formed was in the unique position of having available to it cash reserves the Housing Authorities had set aside for insurance coverage.

The Bureau of Indian Affairs in April of this year received from Marsh & McLennan a report, which the Bureau had commissioned, that set out an estimate of insurance premiums for general liability insurance for Indian contractors performing services for the Bureau. The estimate by Marsh & McLennan for the first year of premiums amounted to $5,499.861.

Representatives of Marsh & McLennan met with the Board of Directors of Double Eagle on May 2, 1989. At that meeting those representatives said that the $5.5 million dollar figure was conservative. Nonetheless, because this is the only first year premium estimate available at this time we have asked Congress to fund the first year premiums in that amount.

The officers of Double Eagle Risk Management, Inc. at the direction of the Board of Directors have asked Congress to provide to the company the sum of one million dollars out of the premium funds to establish the initial capital reserves of the company. This funding to Double Eagle, a non-profit Tribally controlled company, would be in the nature of a demonstration project to determine the viability of an Indian risk management company. Double Eagle has already applied to the Administration for Native Americans (ANA) for a grant to cover first year operating costs of the company.

With this reserve fund Double Eagle will be able to provide liability insurance coverage to those Tribes, willing to participate, contracting with the Bureau for P.L. 93-638 programs. Double Eagle will secure re-insurance, just as other insurance companies do, for estimated claims in excess of its capital reserves. Additionally, Double Eagle through its underwriting criteria will be able to control claims much more effectively than carriers unfamiliar with the uniqueness of

Indian Tribes. Moreover, because the Tribal participants, themselves, are the company there will be more of an incentive to control claims and thereby hold premium rates down.

For those Tribes who do not wish to participate the Bureau could obtain liability coverage from established carriers. In this way a comparison of insurance rates, services and scope of coverage could be obtained and evaluated at the end of the first year of the demonstration project.

The officers of Double Eagle most strongly urge this committee to recommend to the Appropriations Committees that this approach be funded. Double Eagle has already, you as know, written directly to Congressman Yates, Senator Byrd and members of their respective committees asking that such an approach be funded.

Respectfully submitted by Thomas R. Acevedo, Chairman of the Board of Directors of Double Eagle Risk Management, Inc.

SELF-GOVERNANCE AND LIABILITY PANEL
June 9, 1989

Dorothy Dupree, M.B.A.
Chief Executive Officer
Double Eagle Risk Management, Inc.

Senator Inouye and members of the Senate Select Committee on Indian Affairs, thank you for your invitation to present testimony regarding amendments to the Indian Self-Determination Act.

I have been involved, as a member of the Administrative Work Group, in the development of regulations to implement P.L. 100-472 amending 93-638. My main interest and expertise has been on the issues raised by its requirement that the Secretary "be responsible for obtaining or providing liability insurance or equivalent coverage" to tribal "638" contractors.

This new requirement has been a small victory for tribes in that they no longer will have to absorb the high cost of liability coverage in order to procure a "638" contract. I say small victory because, although tribes are no longer directly burdened with this cost, they now face a different set of problems under the new law.

If the Bureau of Indian Affairs and/or Indian Health Service were to purchase a national liability policy on the conventional market, we believe that the budgetary impact will be very high. If this cost is to be paid from an already dwindling pool of indirect funds, this would make indirect costs funding crises of recent years minor in comparison. Plus, these premium dollars would not stay working within Indian Country but would instead add to some non-Indian company's profit margin.

A second problem is the segregation of liability exposures. Most tribes administer programs/enterprises in addition to "638" contracts. They intermingle personnel, space and services, making it difficult to assess the specific exposure of "638" contract activities without input from tribes. As a consequence, a conventional insurance company will tend to over insure, thereby increasing the costs.

BIA AND IHS INACTION

Tribes involved in the regulation drafting work group have been concerned about the hesitancy of either Department to develop implementing regulations on liability insurance. The BIA has contracted with Marsh and McLennan, an insurance broker to assess the feasibility and cost of a national liability policy. It has also asked Congress to delay the liability requirement for one year. The provision of insurance was to be effective beginning in 1990. Tribes have interpreted this to mean Fiscal Year 1990, October 1, 1989.

The BIA Marsh and McLennan analysis is potentially misleading in that it does not address tribal operational practices of "638" programs nor does it include tribal claims history data. (See attached Marsh and McLennan letter to the BIA.) Due to the nature of insurance underwriting, any analysis obtained without the benefit of tribal information would be inadequate. Additionally, the study applied manual rates which would not be applicable to tribal governments due to the significant differences from national norms which exist in Native American culture, with its unique patterns of litigiousness, and politico-legal systems.

TRIBAL INITIATIVES

On March 24, 1989 tribes met in Albuquerque, New Mexico and formed an interim liability board, of which I was chairperson. (See attached letter to Senator Inouye.) We drafted 638 regulations allowing for the formation of self-insurance/risk management pools and investigated the formation of a non-profit company to establish self-insurance pools and provide risk management services to member tribes. (See attached draft regulation.) No formal response was received from either agency regarding the tribal draft.

On May 1st and 2nd, a second meeting of the interim board was held in Denver, Colorado. The outcome of this meeting was the formation of Double Eagle Risk Management, Inc. Chartered under Confederated Salish-Kootenai tribal law. A board of directors was elected and by-laws adopted. (See attached list of board members.)

DOUBLE EAGLE

In May, Double Eagle sent a letter to the Chairmen of the House and Senate Interior Appropriations Subcommittees requesting that $6.5 million be added to the BIA'S FY 1990 indirect cost funding level, earmarked for a one-year demonstration project to provide liability coverage to tribal self-determination contractors, making $1.0 million of these earmarked funds available to Double Eagle to establish its initial capital reserve, and the remaining $5.5 million available for contracting Tribes' premium payments for such coverage offered either by Double Eagle and any other Indian-owned and controlled companies.

We would like your Committee's endorsement of our request. We believe tribes can effectively self-insure for 638 liability. After an initial 3 to 5 year reserve building period, the cost to the federal budget would be minimal when compared to the cost of purchasing an annual conventional insurance policy.

Risk management is a process of identifying, measuring and treating exposures plus the administration of the process. (See attached "Steps in Risk management" Chart.) I won't enumerate the benefits of pooling here, but benefits do exist as many governmental municipalities and enterprises have moved to establish pools in recent years of increasing insurance costs.

As a result of being membership driven Double Eagle benefits member tribes in the following ways:

- Tribes themselves shape the design of coverages provided.
- Loss prevention programs help tribes reduce their exposures and increase reservation safety.
- Claims litigation remains under tribal control and self-governance.
- The insurance premium dollar stays within Indian Country.
- Reserve funds may be reinvested in Indian communities for economic development purposes.

Finally, attached are model charts depicting the inter-relationship of all groups involved in providing "638" self insurance. Also included are two charts showing two difference scenarios of a simplified two-tribe model depicting how liability can be segregated and self funded.

CONCLUSION

Your assistance is vital in two ways. First, exercising leadership with the appropriations committees to secure the necessary development funding. Two, to direct the BIA and IHS to prioritize the development of Indian owned and controlled risk management companies like Double Eagle. We believe the law's requirement that Indian preference be followed, and that self-determination principles be adhered to, combine to make Double Eagle's development essential. We look forward to your support of this wholly tribally owned, controlled, and inspired venture.

Attachment #

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:

APR 27 1989

Memorandum

To: Whom it May Concern

From: Assistant Director, Financial Management

Subject: Attached Estimates of Liability Insurance Costs

The information on manual rates developed by Marsh and McLennan is made available with the understanding that certain assumptions were made by the contractor (i.e., square footage in contracted schools; payroll costs as a percent of total contracts, etc.) that have not been verified.

Further refinement of the estimates will be made by Bureau staff during the course of development of the budget estimates for FY 1991.

Betty L. Wilkinson

Attachment

Marsh & McLennan, Incorporated
Suite 1000
1155 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone 202 828-7921
Facsimile 202 457-9079
TWX 710-822-9271

Timothy M. Sasser
Vice President

April 17, 1989

Ms. Linda Richardson
Assistant Director Financial Management
Bureau of Indian Affairs
Mail Stop 4616
Department of the Interior
Washington, D.C. 20240

Re: Commercial General Liability
Insurance Cost Estimate for Indian Contractors

Dear Linda:

As requested, we have estimated the "manual" insurance premiums for General Liability Insurance for the Indian contractors contracted by the Bureau of Indian Affairs to perform various services. As manual premiums, it should be clearly understood that these are not insurance quotations. There is a wide variation of rates used among insurance companies, with the manual premiums merely being the starting point from which premium adjustments are made based upon subjective underwriting evaluations of the hazards and exposures presented including past claims experience. However, for the purpose of budgeting, you and I agreed that the manual premium approach was the best alternative available to quantify the various unknowns presented by this project at this point in time.

In order to develop these estimates, several assumptions were used. They are:

1. Premium estimates were figured with policies to provide $1,000,000. Combined Single Limit of Bodily Injury and Property Damage coverage under the new simplified "Occurrence" form of coverage.

2. Estimates for Automobile coverage were not made.

3. The basis of premium was the FY 1989 contracted funds information provided by you which totalled $285,711,000., plus the information supplied by the IHS.

4. No estimates were included for Medical Malpractice coverage.

5. No estimates were included for Pollution Liability coverage.

Some of the insurance rate categories from which insurance estimates are derived are based upon aspects other than the revenues received by the contractor. The assumptions we made in order to arrive at the basis of premium to which the insurance rates are applied were:

1. In the case of Schools, the basis of premium is square footage. We assumed that a 1,000 square foot classroom would accommodate 30 students. Given approximately 270,221 students (including adult vocational training), this produces approximately 9,007,000 square feet of school space. We then assumed an additional 50% of space for other school activities such as hallways, cafeterias, bathrooms, play yard, etc. This produced a total basis of premium for Schools of 13,507,000 square feet.

2. For Clinics and Hospitals, the basis of premium is also square footage. These locations were assumed to be approximately 5,000 square feet each. From the total of 267 health systems reported, this produces 1,335,000 square feet of space of which 110 location (550,000 square feet) is hospital space. The remaining 785,000 square feet is for clinics.

3. Other insurance rate categories involving construction activities are based upon payroll. In these situations we assumed that 50% of the cost of the construction was for payroll.

4. Lastly, all other activities were lumped into the category entitled "Government Subdivision, not Federal or State" at population level of zero to 2,500. The basis of premium for this classification is total operating cost. After subtracting the above categories from the total FY 1989 contracted funds, we were left with a basis of premium for this insurance rate category of $185,293,000.

A summary of the insurance estimates follows below:

Classification Description	Basis of Premium	Application of Rate	Rate	Premium
Schools, not otherwise classified - No. 67507	13,507 sq. ft.	Per 1,000 sq. ft.	$ 68.292	$ 922,420.
Street or Road Construction Road Paving Classification No. 99315 and No. 99321	$1,009,150. Payroll	Per $1,000. Payroll	$ 93.63	$ 94,487.
Carpentry - Construction of Residental Properties not over 3 stories Classification No. 91340	$6,374,086. Payroll	Per $1,000. Payroll	$ 42.35	$ 269,943.
Hospitals Classification No. 44425	550,000 sq. ft.	Per 1,000 sq. ft.	$174.524	$ 95,988
Clinics Classification No. 44421	785,000 sq. ft.	Per 1,000 sq. ft.	$ 72.367	$ 56,808.
Governmental Subdivision, Not Federal or State Classification No. 44100 (Population Zero to 2,500)	$185,293,400.	Per $1,000. of Cost	$ 19.214	$3,560,228.
Total:				$4,999,874.
Plus 10% Contingency:				499,987.
Grand Total:				$5,499,861.

I would be more than happy to revise this to reflect any changes in assumptions or refinements to the exposure information.

Sincerely,

April 17, 1989
TMS/slh
Encl.

Name of Contractor: Bureau-Wide Summary
Finance System Location Code:

Activities, Subactivities, Program Element, Subelements	FY 1989 Funds Under Contract	Commercial General Liability Coverage Rate Classification
EDUCATION		
ISEF (Formula Funds)	$ 36,894,728.	67507
Ind. School Program Adjustments	1,762,372.	67507
Institutionalized Handicapped	144,752.	67507
Student Transportation	3,102,077.	67507
Johnson O'Malley Prgs	12,493,248.	67507
Scholarships	19,767,616.	Not Included
Adult Education	2,185,495.	67507
TCCC's Supplement to Grants	607,100.	67507
School Board-Training	14,100.	67507
School Board-Expenses	53,400.	67507
Student Transportation	176,800.	67507
Substance Abuse/Alcohol - Educ. Prgs:	56,400.	67507
School Counselors	440,165.	67507
Subtotal	$ 77,698,253.	
TRIBAL SERVICES		
New Tribes	$ 1,150,000.	44100
Special Tribal Courts	645,137.	44100
Welfare Assistance Grants, Regular	15,241,295.	44100
Special Law Enforcement	879,695.	44100
Contract Support	31,057,326.	44100
United Sioux Tribe Dev. Corp.	99,000.	44100
United Tribes Technical College	1,698,000.	44100
Adult Vicational Training	6,898,465.	67507
Other Empl. Assistance (DE)	1,786,635.	44100
Community Services, General	765,284.	44100
Community Fire Protection	973,132.	44100
Tribal Courts	7,576,903.	44100
Other Aid to Tribal Government	9,794,942.	44100
Social Services	36,238,262.	44100
Law Enforcement	25,890,342.	44100
S. Deter. -- Traning & Tech. Assit.	65,542.	44100
Subtotal	$140,759,960.	

Name of Contractor: Bureau-Wide Summary
Finance System Location Code:

Activities, Subactivities, Program Element, Subelements	FY 1989 Funds Under Contract	Commercial General Liability Coverage Rate Classification
NAVAJO/HOPI SETTLEMENT PROGRAM		
Navajo/Hopi Settlement Program	$ 565,500.	91340
Subtotal	$ 565,500.	
ECONOMIC DEVELOPMENT		
Road Maintenance	$ 2,018,299.	99315 and 99321
Credit and Financing	901,006.	44100
Subtotal	$ 2,919,305.	
NATURAL RESOURCES DEVELOPMENT		
Forest Development	$ 4,214,096.	44100
Water Mgmt. & Development	3,284,000.	44100
Western Washington (Boldt)	1,739,000.	44100
Columbia River	1,396,000.	44100
Klamath Conservation Pgm.	523,000.	44100
Michigan Settlement	1,489,000.	44100
US/Canada Pacific Salmon	2,000,000.	44100
Salmon Tagging, Metlakatla, AK	126,000.	44100
Hatchery Operations	1,347,260.	44100
Tribal Mgmt./Development Programs	2,769,158.	44100
Fish Hatchery Maintenance	461,950.	44100
Irrigation O & M	3,176,300.	44100
Natural Resources, General	1,577,261.	44100
Agriculture	2,294,700.	44100
Agric. Extension Services	225,800.	44100
Forestry	1,960,730.	44100
Water Resources	1,500,400.	44100
Wildlife & Parks	10,506,360.	44100
Minerals and Mining	150,000.	44100
Hunting and Fishing Rights	99,676.	44100
Subtotal	$ 40,840,691.	

Marsh & McLennan, Incorporated

Name of Contractor: Bureau-Wide Summary
Finance System Location Code:

Activities, Subactivities, Program Element, Subelements		FY 1989 Funds Under Contract	Commercial General Liability Coverage Rate Classification
TRUST RESPONSIBILITIES			
Trust Services, General		$ 100,000.	44100
Environmental Quality Svc.		155,700.	44100
Other Rights Proection		392,100.	44100
Real Estate Appraisals		198,900.	44100
Other Real Estate Services		1,259,793.	44100
	Subtotal	$ 2,106,493.	
FACILITIES MANAGEMENT			
Existing Fac. O&M		$ 7,563,454.	44100
GENERAL ADMINISTRATION			
Administrative Services		$ 20,200.	44100
	Subtotal	$ 20,200.	
HOUSING			
Housing Improvement Program		$ 12,182,678.	91340
Housing Training		649,100.	67507
	Subtotal	$ 12,831,778.	
GRAND TOTAL		$285,711,073.	

Attachment D

PASCUA
YAQUI
TRIBE

7474 S. CAMINO DE OESTE • TUCSON, ARIZONA 85746 • PHONE (602)883-2838

March 28, 1989

Senator Daniel K. Inouye
Chairman, Select Committee on Indian Affairs
United States Senate
Washington, DC 20510-6450

Re: P.L. 100-472 - Liability Insurance

Dear Senator Inouye:

A Tribal meeting was held in Albuquerque, New Mexico on March 20, 1989 regarding the implementation of the Liability section of P.L. 100-472 requiring the Secretary to provide liability insurance or equivalent coverage for "638" contractors. Twenty-eight (28) individual Tribes and three (3) Tribal Organizations representing approximately seventy-five (75) Tribes attended this meeting. It was the concern of these tribes that they be allowed as part of the "equivalent coverage" language of the law to establish a Tribal Risk Management Corporation and to develop self-insurance programs which would provide coverage for "638" contractor's liability exposures.

At this meeting a committee was formed to examine this possibility more closely. Regulation language was also developed that would allow for Risk Management pools to be formed. This language was presented to the Steering Committee (SC) responsible for drafting regulations to implement P.L. 100-472. This SC meeting also was held in Albuquerque on March 21 through March 24. Although little response was received from BIA and IHS regarding the proposed regulation language, all Tribes represented at the SC meeting voted in favor of it. Attached is a copy of the proposed language.

It is the Committee's belief and mine as Chairperson of the Committee and a former Corporate Risk Manager that a Tribal Risk Management Corporation could provide better and more comprehensive coverage to "638" contractors at a lower cost in the long term. We are asking that the Senate Select Committee on Indian Affairs hold a hearing on this issue and that Tribes be afforded the opportunity to present their views and concerns.

Respectfully,

D Dupree

Dorothy Dupree
Finance Director, Pascua Yaqui Tribe
Chairperson, Tribal Risk Management Interim Committee

Attachment C

~~policy. In obtaining or providing such coverage, the Secretaries shall take into consideration the extent to which liability under such contracts would be covered by the Federal Tort Claims Act.~~

~~(2) The Secretary shall, to the greatest extent practicable, give preference to coverage underwritten by an Indian owned economic enterprise(s) as defined in section 3 of the Indian Financing Act of 1974, or to a nonprofit corporation.~~

~~(3) Any policy of insurance obtained or provided by the Secretary shall contain a provision that the insurance carrier shall waive any right it may have to raise as defense the sovereign immunity of an Indian tribe or tribal organization from suit, but that such waiver shall extend only to claims, the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the Indian tribe's or tribal organization's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.~~

~~(4) Liability will include actions by tribal employees and occurrences resulting from use of facilities and equipment in the provision of services to clients and patients as well as liabilities that may result from self determination contract activities. This will include professional reciprocal coverage and "good samaritan" efforts by tribal employees.~~

~~(5) No waiver of the sovereign immunity of an Indian tribe or tribal organization shall waive immunity to the extent of any potential liability for interest prior to judgement or for punitive damages or for any other limitations on liability imposed by the law of the State in which the alleged injury occurs.~~

(Albuquerque meeting)

(b) Liability and motor vehicle coverage

(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage without reduction of funding to tribal programs, on the most cost-effective basis, for Indian tribes or tribal organizations carrying out contract, grant agreements and cooperative agreements pursuant to the Act.

(i) The Secretaries shall work together in obtaining, providing, and placing such coverage.

(ii) In obtaining or providing such coverage, the Secretaries shall take into consideration the extent to which liability under such contracts or agreements is covered by the Federal Tort Claims Act, so as to assure that there is no duplication of coverage.

(iii) The term "equivalent coverage" shall include coverage offered by tribally controlled risk management corporations whose memberships are comprised of Indian tribes and tribal organizations carrying out contracts,

grant agreements and cooperative agreements pursuant to the Act.

(A) The Secretaries shall assist such Indian tribes and tribal organizations in developing risk management pools. This assistance shall include, but not be limited to, timely provision of meaningful cost data and information concerning current contracts and agreements, including information on funding levels, type and scope of program activities, and available information on the cost and type of current liability coverage.

(B) In obtaining or providing coverage under this section, the Secretaries shall assure that the liability coverages provided, whether by conventional or risk management policies, are equivalent.

(2) The Secretary shall, to the greatest extent practicable, give preference to the desires of the contractor and to coverage offered by Indian-owned economic enterprises. For these purposes, the term "Indian-owned economic enterprise" shall mean any for-profit enterprise in which at least 51 per centum of the ownership interest is held by members of federally recognized Indian tribes, or any non-profit enterprise in which at least 51 per centum of the controlling interest is held by tribes, or by members of federally recognized Indian tribes.

(3) Any coverage obtained or provided by the Secretary shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims, the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such provider of coverage to waive or otherwise limit the Indian tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(i) No such waiver may waive immunity to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the state in which the alleged injury occurs.

(ii) Any such liability insurance policy or equivalent coverage obtained or provided by the Secretary pursuant to subsection ____ above shall contain an exclusion for all claims covered by the Federal Tort Claims Act as provided in section 102(d) of the Act.

(4) The liability coverage obtained or provided by the Secretaries shall, at the option of an Indian tribe or tribal organization, fully extend to all actions of that tribe or tribal organization and of its employees, the performance of which involve the carrying out of a contract, grant agreement or cooperative agreement pursuant to the Act. Examples of coverage which the Secretaries shall make available include:

(i) Coverage for all occurrences arising from the use of facilities and equipment in the provision of services;

(ii) Professional malpractice and reciprocal coverage;

(iii) Coverage for an employee's emergency action(s) directed to a person who is not an intended beneficiary under the contract, grant agreement or cooperative agreement, but which action is otherwise within the scope of that employee's employment; and

(iv) Directors and officers coverage for members and officers of the Indian tribe's or tribal organization's governing body.

(5) If the Secretary has not provided liability or equivalent coverage as provided herein by 1990, the Secretary shall reimburse an Indian tribe or tribal organization for the cost of such coverage without reducing the amount of funding available for services under the tribe or tribal organization's contracts or grants. (Albuquerque meeting)

Reporting

(a) For each fiscal year during which an Indian tribe or tribal organization receives or expends funds pursuant to a self-determination award, the Indian tribe or tribal organization shall submit, to the Secretary , a report which shall include an accounting of the amounts and purposes for which Federal funds were expended, and information on the conduct of the program or service involved. (need to include reporting requirement of section 5 (f) of the Act)

(b) Indian tribes and tribal organizations shall be required to submit Financial Status Reports quarterly on Standard Form 269 ***or 269a***, as supplemented by categorical expenditure information for salaries, supplies and equipment, subcontracts, other direct costs, and indirect costs, showing incurred costs for the current reporting period and cumulative incurred costs to date for the current contract funding period. (Albuquerque meeting)

Record retention and access to records

(a) Each Indian tribe or tribal organization shall keep records which, at a minimum, include records which fully disclose--

(1) the amount and disposition of awarded funds,

(2) the cost of the ~~project~~ ***contract***,

(3) the cost of the ~~project~~ ***contract*** supplied by other sources, and

(4) such other information as will facilitate an effective audit.

(Albuquerque meeting)

(b) (1) Federal Government. ***Not less than 5 working days from a request,*** the Comptroller General of the United States and the Secretary, or any of their

Attachment D

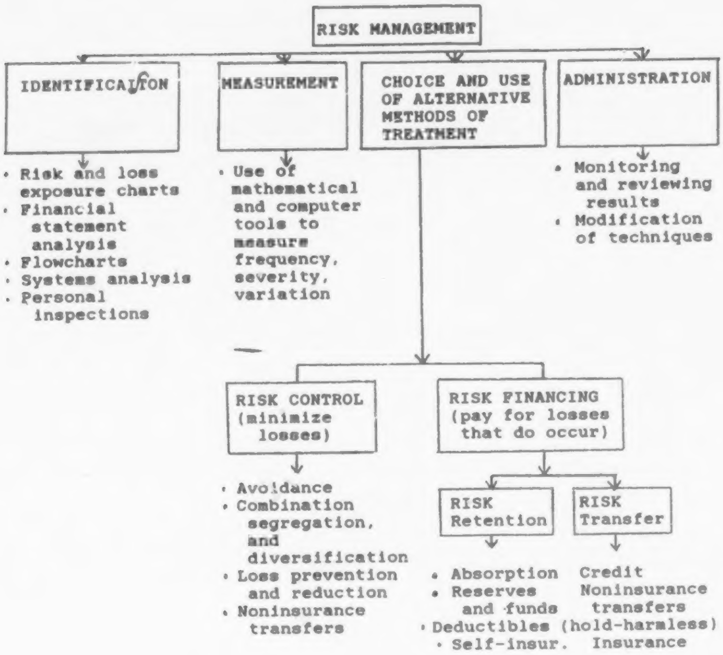
DOUBLE EAGLE RISK MANAGEMENT, INC.

BOARD OF DIRECTORS

AREA 1 (PHOENIX)	ROBERT NEWELL, GOVERNOR, PASSAMOQUODY
AREA 2 (BILLINGS	WES MARTELL, SHOSHONE BUSINESS COUNCIL
AREA 3 (PORTLAND)	BOB GAUTHIER, SALISH/KOOTNEI HOUSING
AREA 4 (ABERDEEN)	SONNY HILL, ROSEBUD SIOUX FINANCE DIR.
AREA 5 (MINNEAPOLIS)	KARLEEN CHRISTENSEN, LAC DU FLAMBEAU
AREA 6 (SACRAMENTO)	JASPER HOSTLER, HOOPA VALLEY V.CHRMN
AREA 7 (ALBUQUERQUE) -	DOROTHY DUPREE, PASCUA YAQUI FIN. DIR.
AREA 8 (EASTERN)	LIONEL R. JOHN, EXEC. DIRECTOR, USET
AREA 9 (ANADARKO)	GAYLON FRANKLIN, SAC & FOX
AREA 10 (JUNEAU)	PHIL BAKER-SHENK, ATTORNEY
AREA 11 (NAVAJO)	TOM LONE EAGLE, BIG BAND PIAUTE
AREA 12 (MUSKOGEE)	BOB CHRISTJOHN, ONEIDA

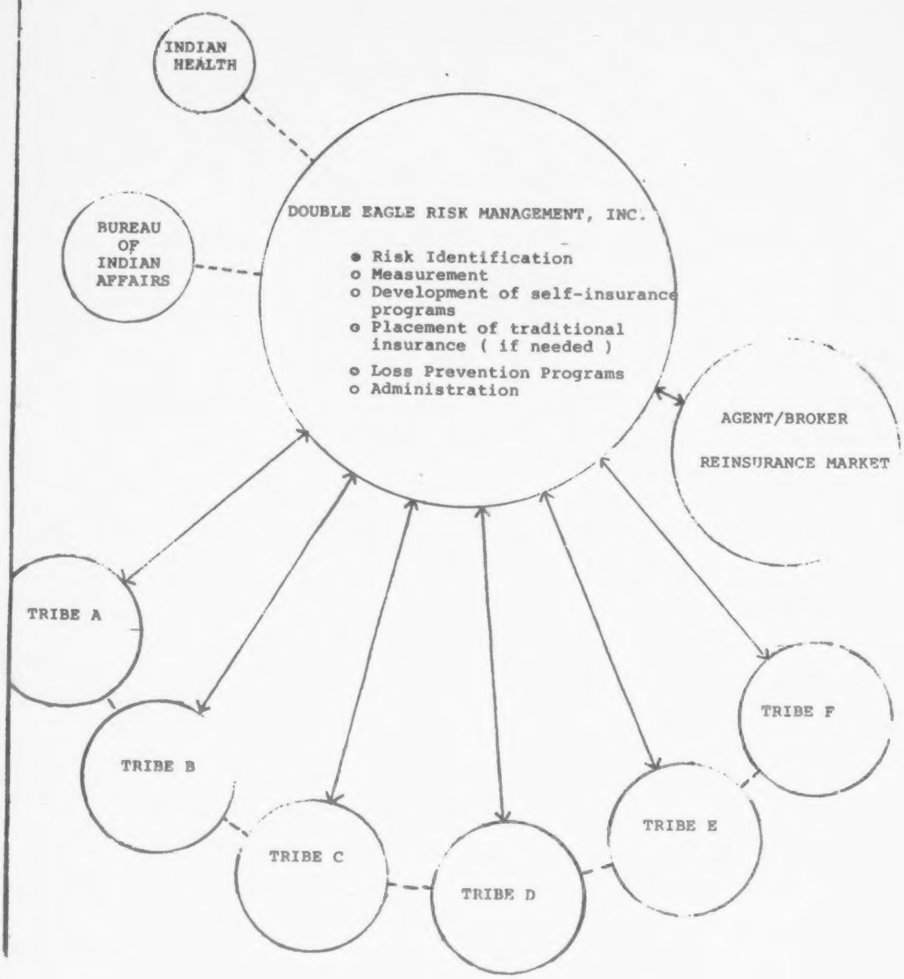
Attachment E

STEPS IN RISK MANAGEMENT


RISK MANAGEMENT
IDENTIFICATION
MEASUREMENT
CHOICE AND USE OF ALTERNATIVE METHODS OF TREATMENT
ADMINISTRATION
• Risk and loss exposure charts
• Financial statement analysis
• Flowcharts
• Systems analysis
• Personal inspections
• Use of mathematical and computer tools to measure frequency, severity, variation
• Monitoring and reviewing results
• Modification of techniques
RISK CONTROL (minimize losses)
RISK FINANCING (pay for losses that do occur)
• Avoidance
• Combination segregation, and diversification
• Loss prevention and reduction
• Noninsurance transfers
RISK Retention
RISK Transfer
• Absorption
• Reserves and funds
• Deductibles
• Self-insur.
Credit
Noninsurance transfers (hold-harmless)
Insurance

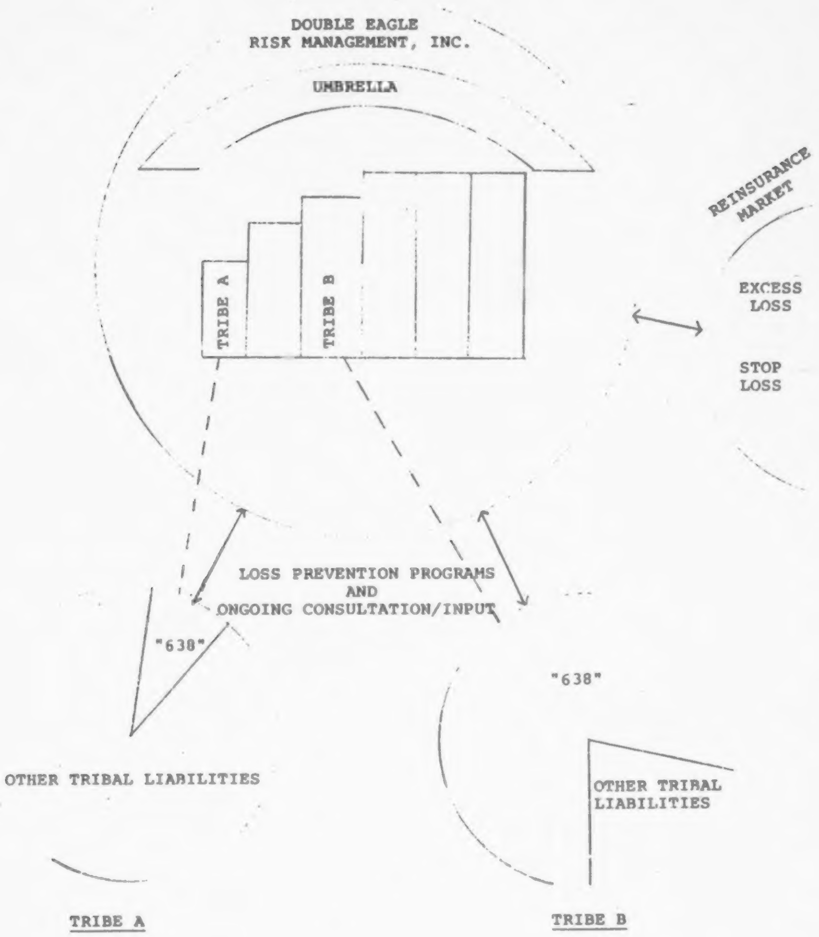
Attachment FA

INTERRELATIONSHIPS OF "638" Liability PARTICIPANTS


INDIAN HEALTH
BUREAU OF INDIAN AFFAIRS
DOUBLE EAGLE RISK MANAGEMENT, INC.
● Risk Identification
o Measurement
o Development of self-insurance programs
o Placement of traditional insurance (if needed)
o Loss Prevention Programs
o Administration
AGENT/BROKER
REINSURANCE MARKET
TRIBE A
TRIBE B
TRIBE C
TRIBE D
TRIBE E
TRIBE F

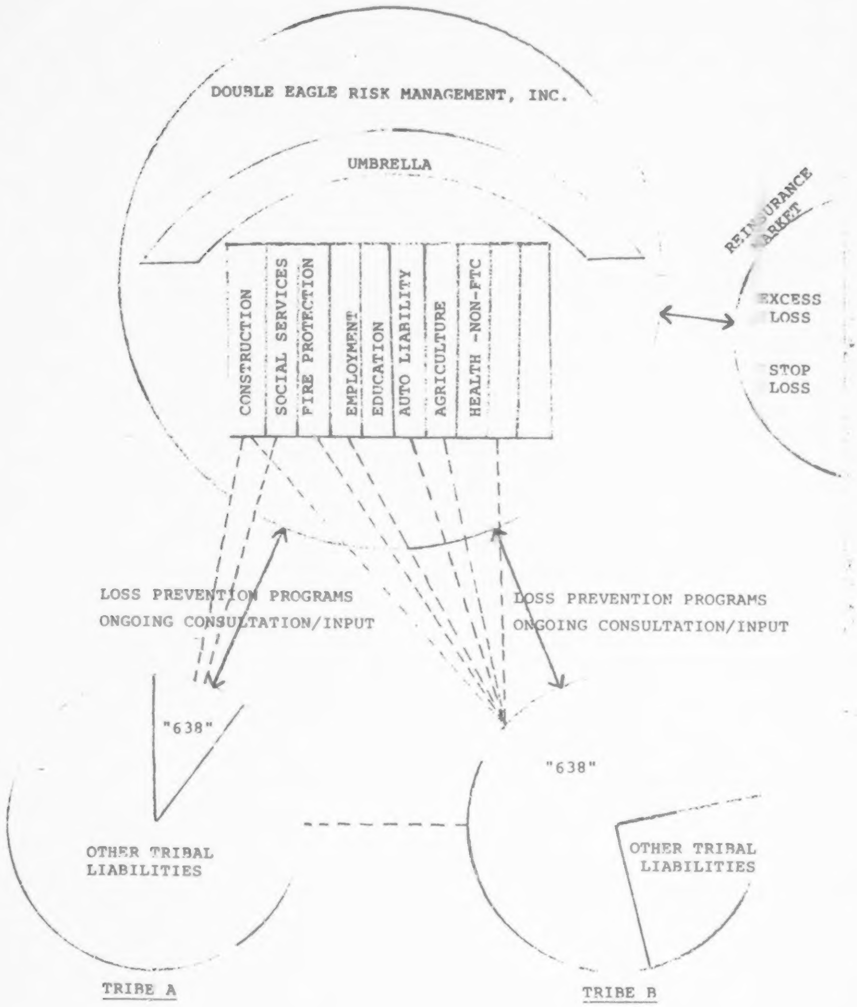
Attachment
f B

COVERAGES BY TRIBAL ACTIVITY LEVEL


DOUBLE EAGLE
RISK MANAGEMENT, INC.
UMBRELLA
TRIBE A
TRIBE B
REINSURANCE MARKET
EXCESS LOSS
STOP LOSS
LOSS PREVENTION PROGRAMS AND ONGOING CONSULTATION/INPUT
"638"
OTHER TRIBAL LIABILITIES
"638"
OTHER TRIBAL LIABILITIES
TRIBE A
TRIBE B

COVERAGES BY ACTIVITY TYPE

Attachment f c


DOUBLE EAGLE RISK MANAGEMENT, INC.
UMBRELLA
CONSTRUCTION
SOCIAL SERVICES
FIRE PROTECTION
EMPLOYMENT
EDUCATION
AUTO LIABILITY
AGRICULTURE
HEALTH -NON-FTC
REINSURANCE MARKET
EXCESS LOSS
STOP LOSS
LOSS PREVENTION PROGRAMS
ONGOING CONSULTATION/INPUT
LOSS PREVENTION PROGRAMS
ONGOING CONSULTATION/INPUT
"638"
OTHER TRIBAL LIABILITIES
TRIBE A
"638"
OTHER TRIBAL LIABILITIES
TRIBE B

TESTIMONY OF JAMES M. SIZEMORE
SUBMITTED TO THE UNITED STATES SENATE
SELECT COMMITTEE ON INDIAN AFFAIRS
HEARING ON SELF-DETERMINATION ACT AMENDMENTS AND RELATED ISSUES
JUNE 9, 1989

Mr. Chairman, members of the Committee, I am Jim Sizemore, a self employed CPA from Portland, Oregon. I am presenting testimony with respect to the Federal appropriations process for Indian programs, with emphasis on the Indian Priority System utilized by the Bureau of Indian Affairs. I have been involved in this process on behalf of the Confederated Tribes of the Warm Springs Reservation of Oregon since 1976. I appreciate this opportunity to discuss the budget process with the Committee.

I recently served as a member of the Portland Area BIA/Tribal team to develop a report on the Budget Process, which was required by Congress within the Self-Determination Amendments. Our team agreed that legislation may be needed to correct deficiencies in the Federal appropriations process so that Self-Determination can be more fully implemented. With this in mind, we attempted to provide an educational report, which included the history of the Indian Priority System and how it works. We also included a review of some of the problems with it and recommendations for improvements. Because the Indian Priority System only accounts for 25% of the Bureau budget, our group expanded its discussion to include appropriations to the BIA and other agencies. I have attached the Executive Summary from that report to my testimony, and provided full copies to your staff. (Exhibit A)

The Indian Priority System (IPS) is a budget planning system which is "theoretically" utilized to permit tribal participation and priority setting in the planning of funding levels for programs operated on their behalf by the BIA. It has evolved from a system begun in the late 1960's to identify recurring funding for programs operated at Indian locations and to enable Tribes to be involved in planning and priority setting.

In 1970, President Nixon announced the new "Self-Determination Policy", indicating that the time had come to create conditions for a new era in which the Indian future is determined by Indians. Following that announcement the BIA implemented the "Band Analysis". The band analysis is the predecessor of the Indian Priority System. It was retitled the "Zero Base Budget" system under President Carter and then the Indian Priority System. Over the past 19 years the basic mechanics have not changed a great deal.

Using the Indian Priority System, the BIA and Tribes plan how funding would be distributed to each program based on various levels of appropriations. The 1991 program allows planning at the 80, 90, 100 and 110 percent level based on the 1990 request. Tribes prioritize incremental funding for each program at each level to set out which programs are increased or decreased first, depending on the appropriation level. (Exhibit B)

At Warm Springs the Tribe jointly plans and integrates IPS programs with Tribal programs. The Tribe clarifies expectations of the BIA through the Superintendent and supports IPS budget submissions which reflect the joint planning. The Tribe and the BIA have jointly developed "program budget summaries which set out the roles and responsibilities of the BIA and the Tribe. The Tribe expects to hold the federal government responsible to fullfill its' obligation to the Tribe. At the same time the Tribe holds itself accountable, as local government, to do its' part. These program summaries reflect the integrated efforts. They are not presently available to the central office, since the central office does not collect such data. However, they might provide a useful tool to assist the BIA in developing a profile of programs and needs for each location.

This process, at Warm Springs, has been improved each year and results in efficiency of joint operations. The Tribe has enjoyed a very good working relationship with the Agency and Area. Unfortunately, over half of the BIA funding is related to non-IPS programs which cannot be integrated since the Superintendent has little control over them. Several key programs have been removed from the IPS after the Tribe placed high priorities in them and increased their relative funding.

As it is designed, the system would permit Tribes to do long term planning for the programs. They could add and reduce emphasis to impact needs in their communities as the needs change and as goals are met. The process is designed to support Self-Determination, and could be an excellent tool if it were honored. Unfortunately, that has not been the case. The BIA, OMB and even Congress have removed programs from the system to the point that Tribes can have no confidence that it will be honored in the future. Tribes unfortunate enough to place emphasis on the wrong program have found their recurring funding base drastically reduced, and with it their ability to address the needs of their community.

Line officers such as Area Directors and Superintendents have less and less authority, as more and more of the budget decisions are made by staff positions in the Central Office.

Under a Self-Determination Law, one would expect that Tribal decision making would have increased gradually, permitting Tribes to take over more and more decision making. Let's look at the facts;

> In 1970 over half the BIA budget was placed in the Band Analysis for local priority setting. In 1989, only 25% of the BIA budget is in the IPS for local priority setting.
>
> In 1980 the Tribes were given a choice of 37 programs into which to prioritize. The 1991 planning package has only 29.
>
> The BIA has proposed to remove several more programs from the IPS through the budget process, but the Appropriations Sub-Committees have not permitted it.
>
> In several cases, such as forestry and self-determination grants, the Congress has restored reductions proposed through the budget process, only to have BIA attempt the same reduction the next year.
>
> In the case of Self-Determination Grants, the Congress restored a portion of the 1987 reduction in 1988 and instructed BIA to return it to the appropriate locations. This was not done, and in the 1990 budget the BIA seeks to cut the amount again. BIA seems to think as little of Congressional wishes as it does Tribal priorities.
>
> New charges have been levied against local IPS programs for costs such as ADP operations. Additional charges are shifted to IPS programs from non-IPS programs, such as telephone costs, formally paid from Facilities O&M.
>
> Mandatory federal pay costs have been implemented without additional funding. Inflation has eaten away at spendable resources. New Tribes are added without commensurate funding and the BIA doesn't request a funding base for new tribes.
>
> Some Tribes have refused to participate in the IPS planning process because it has not been honored. Many others have indicated their objections to the continued withdrawal of programs.
>
> In Multi - Tribe agencies, many Tribes cannot identify their share of recurring funding or do independent planning. Some share agency budgets with ten to fifteen other Tribes.

Perhaps the greatest weakness in the system is that it has no legislative or regulatory basis. It is guided by the Bureau Manual (BIAM) which can be changed without Congressional or Tribal involvement. There cannot be an effective government-to-government relationship when the process can be unilaterally altered by staff level federal employees.

The Portland Area report provides more of the specifics about these shortcomings in the system. It also addresses what the team felt should be principles and concepts of an effective process, and specific recommendations. Some key things that need to be addressed are:

Stability of Financing:

Congressional language within the Self-Determination Policy supports the development of "Strong and Stable Tribal Governments, capable of administering quality programs and developing the economies of their communities". Strong and stable governments need stable finances. Then they can address economy. Through developing economies, Tribes can lessen dependence on Federal resources.

More, not less, of the Federal resources should be identified within recurring base funding at Tribal locations, to permit Tribes to plan more effectively.

Adjustments to reflect inflation should occur first within the budgets, before new initiatives of the BIA and IHS are addressed.

The system should not permit changes at any level below the Assistant Secretary, and should require full disclosure and consultation before such change is made.

Increased Flexibility to Tribes:

This year the BIA eliminated Self-Determination Grants. The budget justifications indicate that the program has served its purpose. Nothing could be more ridiculous. The purpose of self-determination grants was to strengthen Tribal governments. How many have effective legislative and regulatory processes? How many have systems for maintaining their statutes, codifying them and promulgating regulations so that they can effectively self govern? How many have achieved a degree of economic self-sufficiency? This is just one example of how Tribes are robbed of their flexibility by bureaucrats who work in Washington D.C. and seem to know more about Tribal needs than do Tribes.

Tribes should be able to prioritize funding into any program authorized by Congress. Not just those the BIA Central Office thinks Tribes need. This Committee can promote such flexibility.

Reduced Competition for Funding:

Since 1970 there has been no change in the structure of BIA or IHS. Both still utilize an Area/Agency and Area/Service Unit structure. As Congress is limited by the Federal deficit, inflation has eaten away at the buying power of the appropriated funds. This has put Tribes in competition with the two agencies for the same funds. Many Tribes request Field Offices so that they can get out from under Agencies and access Area Offices directly, yet the BIA resists the change. The cost of administrative personnel at Agencies has risen with inflation, requiring funds to be shifted from programs just to cover base salaries.

American industry is reducing layers of management and becoming more efficient. Both agencies should look into the future at their changing roles and begin designing an appropriate structure.

Federal Statutes in conflict:

The Indian re-organization act provided that the Secretary would notify Tribes of amounts requested on their behalf each year. With only 25% of the budget in the IPS system, this requirement is not being met.

What occurred in Facilities Operations and Maintenance in 1988 should not be permitted to occur. The BIA or IHS should be required to describe the impact of budget changes to Tribes. When we see a reduction which, as described, should not impact us, then take a 35% reduction, on a basis totally inconsistent with what was presented to Congress, we have to question the integrity of the system. These agencies should say what they are going to do and then do what they say with the money.

How can a government-to-government relationship exist when the financing of services by one government for another is secret? Yet that is the case. First, the Presidents budget is secret until submitted to Congress. Next, it is nearly impossible for a Tribe to determine, based on the budget justifications, what the funding will be for their programs. While we recognize that the President has certain prerogatives, we don't believe that the President, the Secretary of Interior, the Assistant Secretary-Indian Affairs or their counterparts in HHS look at every page of the budgets for these agencies. The fact is that many decisions get made below their level. It appears Tribes are being impacted by individuals two or three layers down from the Assistant Secretary. Is this consistent with a government-to-government relationship?

This Committee can explore the conflict between the Indian Re-organization act, the Self-Determination act and the Federal budget law.

Perhaps the conflict can be best resolved by amendment of the Indian Re-Organization act to more clearly define what information Tribes are to receive. The Portland Area report incorporates specific recommendations which this Committee could consider.

Equitable Distribution of Resources:

One of the chief reasons for removing programs from the IPS has been to achieve equity in distribution of funds for that particular program. Unfortunately, this often creates more inequity because it unfairly penalizes Tribes who have made that program a priority.

When the Band Analysis was developed and initial base funding was established, the level was based on what had been spent at each location. To the extent that inequity existed at that point, it was then carried into the system. Since then, removal of programs from the IPS, recognition of new Tribes without commensurate funding and other forces have impacted funding levels.

The BIA is presently examining this question, through a study contracted for last year. Unfortunately, Tribes were not involved in the design of that study, and have not been provided any information about the findings. We believe that to work on this issue behind closed doors, without involving Tribes is inexcusable.

There is most likely a need for two or three layers of funding. Some of the funding should be based on equity, some should be based on need and some based on trust obligations.

The examination of alternatives more appropriately belongs with the Congress and the Tribes. BIA should be required to make all information about the Equity Study available to the Tribes and Congress. No implementation of any changes should be permitted except as approved by Congress. If changes are made the following ground rules should apply;

> Limit to a very small percentage any reduction from any location in any year.
>
> Take care that the system does not penalize Tribes for committing their own resources or for their successes.
>
> Any formulas utilized should be made public and any factors utilized in formulas should be supported with information which can be proven accurate. Tribes should be provide opportunities to review and respond to any such formulas and factors before they are implemented.

Summary:

Mr. Chairman, stable and consistent financing would be necessary to any government. Indian Governments are no exception. Certainly, if the policy of Self-Determination is to be meaningful, Tribes should have a greater say in how that financing is developed. Thank You.

EXHIBIT A

Federal Appropriations for Indians

In response to Congressional request, pursuant to Public Law 100-472, a review of the Federal appropriations process as it relates to the Bureau of Indian Affairs Budget, the Indian Priority System which is a part of that budget and appropriations to other Federal agencies for the benefit of Indians.

Prepared by representatives of Northwest Indian Tribes and Bureau of Indian Affairs staff from the Portland Area.

March 1989

Executive Summary

In 1934, the Congress enacted the Indian Reorganization Act which reaffirmed the right of Tribes to Organize as governments and also provided that "the Secretary of the Interior shall advise such Tribe or its Tribal Council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress".

During 1970, following over 200 years of changing federal policy with respect to Indian Tribal governments, President Richard M. Nixon announced a new federal policy of "Self-Determination" indicating that ..."The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions".

In 1974, the Congress of the United States enacted the Indian Self Determination Act, Public Law 93-638. The federal policy of Self-Determination became law on January 4, 1975. The Congress declared its commitment "to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian Self-Determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services".

In 1983, President Ronald Reagan issued an American Indian Policy statement which reaffirmed the Self-Determination Policy. President Reagan pointed out that "The principle of self-government set forth in this Act was a good starting point. However, since 1975, there has been more rhetoric than action. Instead of fostering and encouraging self-government, federal policies have by and large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decision making, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency". The President went on to "reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination".

Clearly the Congress and the Executive Branch intended that Tribal Governments have an active role in planning the funding levels for those programs operated at their locations to satisfy the Federal obligations as well as those programs of assistance which are provided their communities which are also provided to state and other local governments.

However, despite more than a decade of Congressional and Executive commitment to the policy of Indian Self-Determination, Indian Tribes do not effectively participate in the Federal budget process. Today, Indian Tribal leaders are among the least powerful participants in the Federal appropriations process, much less powerful than Federal employees of the administration and individual members of the Congressional staff.

Tribal governments, who depend heavily on recurring federal appropriations are legally locked out of the budget formulation process for the most part while the Presidents budget is secret until delivered to Congress. Then they must scramble to determine what has happened to the programs on which they depend and are frequently unable to determine what impact the changes will have on them at their locations. Tribal councils are not provided full information about the estimates before they are submitted to Congress. In fact, the budget submissions to Congress do not even provide the required information on a tribe by tribe basis. Clearly the intent of the Indian Reorganization Act is not met.

Frequently the budget presentations to Congress are inaccurate or misleading, yet the Tribal leaders are not provided the information needed to set the record straight. Such has been the case with contract support and indirect cost funds for many years.

Annually Tribal leaders are asked to participate in the planning process to set the priorities for part of the funds which support Bureau of Indian Affairs programs at their locations. This is presently called the Indian Priority System, which has evolved from a budget planning process begun in the 1960's to give tribal leadership a voice in the planning. It involves the recurring base funding for programs at their locations and in early 1970 included nearly half of the Bureau of Indian Affairs budget. However, over the years, program after program has been removed from the system to be distributed by another method or the programs discontinued. Frequently these were actions by Administration officials, and sometimes Congress itself. Today less than 25% of the BIA budget is in the Indian Priority System.

Several tribes have prioritized more funds into important programs at their locations, only to have that program reduced, or removed from the system after the planning process. When this occurs their local base of recurring funding is permanently reduced, and with it their ability to satisfy important needs at a later date.

Recently, some Tribes have refused to participate in the planning process known as the Indian Priority System because it has been violated so many times that they don't believe it will be honored. Many other tribes have indicated frustration with the continuing failures to honor the system.

Frequently the removal of programs from the IPS does not solve the problem which the BIA seeks to correct. Such as the case of the removal of Road Maintenance from the IPS in 1989. Yet it is those tribes who placed a higher priority on Roads Maintenance and provided for a well funded program that are the net losers when such a program is removed.

There are also problems with allocations of funds which are not part of the Indian Priority System. In both the Bureau of Indian Affairs and the Indian Health Service, both budgets are restated in a different manner almost every year, making it difficult to determine what is really planned.

Statements made in the budget justifications about budget plans are not carried out as represented to Congress. For example in Fiscal Year 1988 the Bureau of Indian Affairs budget justifications indicated a several million dollar reduction for Facilities Operations and Maintenance. The justifications indicated that several old and unused buildings would be closed down and efficiency gains would be realized. What really happened was a redistribution of budgeted funds. Tribes in the Portland Area saw over 35% reductions to the recurring funding for facilities at their locations. Staff was laid off, lawns dried up, landscape went unkept, building maintenance fell behind and Tribal leaders were informed that buildings would likely be shut down and the programs operating out of them curtailed. Federal grounds occupying the centers of many Indian communities became shameful eyesores.

Frequently the Bureau of Indian Affairs has changed accounting policies, changing the method of making expense allocations from area to agency level or from one program to another. So while it looks like funds are being maintained, they are actually being diminished.

Inflation has also eaten away at the relative buying power of funds which are part of recurring base funding and little if any information is provided to Congress about the impacts. Target levels for funding since 1980 have decreased more often than they have increased while inflation (consumer price index) has rendered the 1980 dollar worth 64 cents today. Basic BIA administrative costs, which must increase with inflation and unbudgeted federal pay increases, rise at the expense of service programs and Tribal contracts.

Budget justifications reflect very little information about the needs of Individual Tribes. There is in fact no present method for Tribes to enter into long term agreements or present comprehensive assessments of needs in the budget process.

Tribes have little, if any, communication with other Federal agencies during the budgeting process, and are provided little information which will permit them to dialogue with Congress as the budget is deliberated.

It would seem that the Self-Determination policy which seeks to strengthen Tribal government and provide more decision making flexibility to them would call for an increase in Tribal involvement, and an increase in Tribal input. It would also seem that the budgets would provide an opportunity for individual Tribal needs to be appropriately represented. Yet, in the first twelve years of Self-Determination the opposite has occurred.

If one reviews the Presidents budget for the Department of Interior one will find governments of Trust Territories and Compacts of Free Association with each reflected independently. Yet within the Bureau of Indian Affairs and Indian Health Service budgets, one finds no mention of individual Tribes except special projects. Are Tribal Governments less important? Are the obligations to individual Indian Tribes any less binding?

During 1987, Indian Tribes from across the nation worked with Congressional representatives in formulating needed changes to the Indian Self Determination Act. These changes were needed to remove obstacles from the full implementation of the Act as it was intended when originally passed by Congress and signed into Law in January of 1975.

In addressing themselves to the Congress, many Tribes took issue with the appropriations process and the failure of the federal agencies to properly reflect Tribal needs and priorities. Many complained that, once they took over programs under Self-Determination contracts, the funds were cut off by the agencies. Some indicated that it seemed they were in competition each year for the funds with the same Federal agencies who were supposed to be implementing the Self Determination policy. Many voiced concern that Congress was not provided accurate information through the appropriations process.

Within the Self Determination Amendments of 1988, the Congress provided an opportunity for a review of the process under Section 106 (i) which states:

> "Within one month after enactment of this section, the Secretary is mandated to establish a team in each area of the Bureau of Indian Affairs which consists of agency personnel and tribal representatives for the purpose of analyzing the "Indian Priority System" and other aspects of the budgeting and funding allocation process of the Bureau of Indian Affairs for the purpose of making a report to Congress with appropriate recommendations for changes and legislative actions to achieve greater tribal decision-making authority over the use of funds appropriated for the benefit of tribes and their members. The report along with the analysis, findings and recommendations of the area teams shall be submitted to Congress within six months of enactment of this provision. The Secretary may submit to Congress separate comments on the information and recommendations on the report."

This report was prepared by the Portland Area team of Tribal and BIA representative which was assembled to respond to Congress on this important matter. In developing the report, the team did not wish to superimpose its self over Tribal leadership in determining what specific legislative actions should be taken, but rather desired to provide a tool which would assist Tribal leaders and the Congress in seeking solutions to the many appropriations related problems. It is designed to provide a factual history of the Indian Priority System, a discussion of problems surrounding appropriations and some general concepts which the team felt should be part of any budget process. It also contains some specific recommendations for immediate and more long term solutions to provide a federal appropriations process which supports the spirit and intent of the Indian Self Determination Policy.

Among these are the formal recognition by the Congress of a budget formulation process which removes the conflict between the Indian Reorganization Act, the Self-Determination Act, and the Federal Budget laws.

This process should also support a true government-to-government relationship in the appropriations process, to ensure Tribal input is not shrouded or lost and that the budget submissions reflect accurately and openly the funds provided for each Tribe. It should also be flexible to permit different Tribes to be treated differently, based on their unique needs. It should recognize that the Federal obligation is to each Individual Indian Tribe, not to Indians in general.

If Self-Determination is to be meaningful, it must be extended to the process by which a determination is made of the level of Federal support to be provided Indian Tribal Governments. It must be adequate to meet the needs in carrying out the ongoing obligations of the Federal government and consistent and dependable to support the continued development of "strong and stable" Tribal governments.

If Tribes are able to effectively plan and efficiently utilize available Federal resources, then in the long run they will be less dependent. And that is what Self-Determination is all about.

PROGRAM	FY 91 BASE	80% LEVEL			90% LEVEL			100% LEVEL			110% LEVEL			? NEED
TRIBAL COURTS	108.9	87.0			108.9			108.9			122.0			
SOCIAL SERVICES	150.5	77.3			77.3			150.5			162.0			
LAW ENFORCEMENT	127.0	102.0			114.0			127.0			140.0			
AGRICULTURE	199.0	153.0			176.9			199.0			220.0			
FORESTRY	1,431.0	1145.0			1,310.0			1,431.0			1,547.0			
WATER RESOURCES	68.5	68.5			68.5			68.5			80.0			
WILDLIFE MGMT	62.4	50.0			55.0			62.4			72.0			
REAL ESTATE SVC	108.0	102.0			108.0			108.0			145.0			
EXECUTIVE DIRECTION	107.0	104.0			107.0			107.0			112.0			
ADMINISTRATION	215.0	173.0			194.0			215.0			235.0			
	2,577.3	2,061.8			2,319.6			2,577.3			2,835.0			

THE SUPERINTENDENT AND TRIBES WORK TOGETHER IN ESTABLISHING FUNDING LEVELS FOR PROGRAMS.

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UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs

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DECISION RANKING CHART

(Dollars in Thousands)
(FTE in Work Years and Tenths)

1 LOCATION: Warm Springs Agency

3 TRIBE: Conf. Tribes of Warm Springs

2 LOCATION CODE: P09-01

4 FISCAL YEAR: 1991

DECISION PACKAGES		7 PROGRAM TITLE	FUNDING & STAFFING LEVELS				
5 PRIORITY RANKING	6 PACKAGE CODE		8 THIS PACKAGE		9 CUMULATIVE		
			$M	FTE	$M	FTE	
13	722	Administrative Services	21.0	1	2250.8	62	
14	422	Agriculture	23.9	0	2274.7	62	
15	652	Other Real Estate Svc	6.0	0	2280.7	62	
16	242	Law Enforcement	12.0	1	2292.7	63	
17	512	Wildlife Mgmt & Dev	5.0	0	2297.7	63	
18	202	Tribal Courts	21.9	0	2319.6	63	90%
19	483	Forest Program Mgmt	121.0	4	2440.6	67	
20	723	Administrative Svc	21.0	1	2461.6	68	
21	423	Agriculture	22.1	0	2483.7	68	
22	513	Wildlife Mgmt & Dev	7.4	0	2491.1	68	
23	243	Law Enforcement	13.0	0	2504.1	68	
24	233	Social Services	73.2	2	2577.3	70	100%

PAGE 2

PRIORITIES ARE ADDED AT THE 80% LEVEL – THE WAY THE PROGRAM IS SUPPOSED TO WORK – WHEREVER TOTAL FUNDING LINE IS DRAWN – THE PROGRAMS ABOVE THE LINE would be FUNDED

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UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs

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INDIAN PRIORITY SYSTEM

DECISION RANKING CHART

(Dollars in Thousands)
(FTE in Work Years and Tenths)

1 LOCATION: Warm Springs Agency

3 TRIBE: Conf. Tribes of Warm Springs

2 LOCATION CODE: P09-01

4 FISCAL YEAR: 1991

DECISION PACKAGES		7 PROGRAM TITLE	FUNDING & STAFFING LEVELS				
5 PRIORITY RANKING	6 PACKAGE CODE		8 THIS PACKAGE		9 CUMULATIVE		
			$M	FTE	$M	FTE	
25	424	Agriculture	21.0	1	2598.3	71	
26	534	Fisheries Mgmt & Dev	50.6	0	2648.9	71	
27	654	Other Real Estate Svc	11.0	0	2659.9	71	
28	514	Wildlife Mgmt & Dev	9.6	0	2669.5	71	
29	244	Law Enforcement	13.0	0	2682.5	71	
30	714	Executive Direction	5.0	0	2687.5	71	
31	484	Forest Program Mgmt	116.0	0	2803.5	71	
32	504	Water Resources	11.5	0	2815.0	71	
33	724	Administrative Svc	20.0	1	2835.0	72	110%

10 ______________________ ______________________ ______________
Superintendent Tribal Official Date

PROGRAM BUDGET SUMMARY - FY 1991

PROGRAM: Tribal Court

FUNCTIONAL STATEMENT: This is a P.L. 93-638 contract. Personnel services and other cost of tribal staff to strengthen and assist in the effective operation of Indian Court Systems. Includes legal assistance and guidance to Tribal judges; provision for professionals to serve as appellate judges, defense counsels, and prosecutors; and professional probation and parole services provided directly to tribal courts and for other probation and parole activities.

TRUST RELATIONSHIP: The Secretary of Interior approved the Warm Springs Law and Order Code, and subsequent modification as amendments. He has oversight responsibility to ensure equal justice for all through the Tribal Court. The Superintendent has concurring authority in matters regarding marriage, adoption, conservatorship and guardianship on the Warm Springs Reservation. He is named in court orders pertaining to safeguarding minors funds.

BUDGET:

80%:	$ 87,000	Provides salary for Chief Judge and Associate Judge.
90%:	$108,900	Provides salary, travel, supplies and related costs for the Chief Judge, Associate Judge, and clerical support.
100%:	$108,900	Same as 90% level.
110%:	$108,900	Same as 90% level.

STRATEGY: The Tribal Court will interpret tribal laws and ordinances, adjudicate violations free from outside influences, provide efficient resolution of disputes, and provide judicial services that protect the community and guarantee the rights of individual Indians. Because of the important nature of this program, there is no reduction of funds at the 90% level.

BIA PROVIDES: Funds for the P.L.93-638 contract, oversight of the tribal judicial system, contract monitoring to assure compliance to contract provisions, and technical assistance.

TRIBE PROVIDES: P.L. 93-638 contract application, qualified judges, prosecution services, defense counsel, rehabilitation alternatives, probation and parole, contract progress reports, and contract invoices.

PROGRAM BUDGET SUMMARY - FY 1991

PROGRAM: Social Services

FUNCTIONAL STATEMENT: Responsible to the Superintendent for providing an on-going program of social services, including social and financial counseling to families and children to assist in making satisfactory social adjustments and in planning the use of money; providing counsel to agency staff on technical and professional matters; recommending to the Superintendent when it is determined that there is a need for supervision of funds held in IIM; and assisting the Tribal Social Services programs. Carries a primary responsibility for liaison and coordination programs with the Tribe s health and social services programs and also with public and private social agencies. Responsible for administering a general assistance program for qualified applicants. Coordinates with schools and parents in matters related to student placement, displacement, discipline, and provides technical assistance and monitoring to grants and contracts

TRUST RELATIONSHIP: The Tribe looks to the Superintendent to provide social outreach for individuals who are not able to function independently with the goal of assisting them to the extent possible to achieve independent functioning. The Superintendent is trustee for such persons and carries out trusteeship over their monies and person including authority to withhold per capita and other monies when circumstances dictate.

BUDGET:

80%:	$ 77,300	Provides for one GS-12 Social Worker and one GS-4 clerical support person, with related costs.
90%:	$ 77,300	Same as 80% level.
100%:	$150,500	Provides for one GS-12 Social Worker, one GS-11 Social Worker and a GS-5 Clerk, with related operating costs. Also adds a GS-7 case worker who will administer the general assistance program for the three tribes served by the agency.
110%:	$150,500	Same as the 100% level.

STRATEGY: Since the Confederated Tribes have no social workers, there exists a void in that area. This funding will permit a social worker and staff to concentrate on effective social work. It is suggested that tribal social services programs would be supervised by the GS-12 Social Worker (senior citizens, welfare, etc.). Preference is for the BIA to hire all four positions, but if BIA cannot obtain the dessired qualified employees, the BIA would hire only the GS-12 social worker and the tribe would contact for other positions under P.L. 93-638 and place them under the supervision of the BIA social worker.

BIA PROVIDES: Social outreach, financial counseling, supervision of controlled IIM accounts, trusteeship of trust funds, counseling services, coordination with other Federal and/or State Social Service programs, boarding school enrollments, and a general assistance program.

TRIBE PROVIDES: Referrals for social services and general asistance, trust funds, program assessment, support of program goals and objectives, and qualified students.

PROGRAM BUDGET SUMMARY - FY 1991

PROGRAM: Law Enforcement

FUNCTIONAL STATEMENT: Responsible to the Superintendent for the Federal law enforcement program on the Warm Springs and the Burns-Paiute Indian REservaitons; responsible for investigation of the reporting to the U.S. Attorney, violations of the 15 major crimes under Title 18, USCA: providing technical assistance, guidance and assisting the Tribes in development, implementation and follow-up of programs relating to the prevention of crime (adult and juvenile); upgrading of law enforcement through training, etc.; rehabilitation programs for adult and juvenile offenders and contract representation. Assists the Superintendent in carrying out oversight of the tribal law enforcement program.

TRUST RELATIONSHIP: The Warm Springs Confederated Tribes looks to the Superintendent to provide Federal law enforcement services that are professional for the investigation of the 15 major crimes reporting directly to the United States Attorney coordinated with the responsibilities of the Federal Bureau of Investigation (FBI) towards prosectutive efforts in Federalcrimes. Relationships are developed with County District Attorneys for those crimes that are wihtin the Warm Springs Indian Reservation. Responsibility to provide technical support and assistance to the Tribes law enforcement program through development of memorandum of agreements, contracs and providing training and support resources.

BUDGET:

80%:	$102,000	Program would be reduced to one Criminal Investigator with a Secretary for administrative and criminal case files. Major crimes, Federal crimes and aggravated Tribal offenses would receive only a minimum of investigative service due to the lack of manpower.
90%:	$114,000	Program would remain reduced to one Criminal Investigator with a Secretary for administrative and criminal case files. Some outdated equipment could be replaced.
100%:	$127,000	Program would provide for one Criminal Investigator GS-11 with 25% premium pay, one Criminal Investigator; GS-9 with 25% premium pay; and one Secretary, GS-5, with related operating costs. There would be timely response to all major crinmes, Federal reported offenses,aggravated Tribal offenses; and providing technical assistance and support services to the Warm Springs Tribal Police programs and the Burns-Paiute Reservation.
110%:	$140,000	The increase would provide replacement of outdated; equipment for the modern and effective methods of combating narcotic traffic, specialized training, establishment of narcotic and crime prevention programs and support services to the Tribal Police programs in team Crime Prevention Projects.

PREPARED STATEMENT OF TWILA MARTIN-KEKAHBAH

My name is Twila Martin Kekahbah, Tribal Chairperson of the Turtle Mountain Band of Chippewa in North Dakota. I would like to thank you for the opportunity to provide testimony on the Indian Priority System (IPS) and how it relates to self-determination. Due to the importance of this issue, I have been accompanied by my Council and other members of our Tribe.

The Turtle Mountain Band of Chippewa Indians' membership includes over 25,000 enrolled members of which over 13,000 members live on or adjacent to the reservation. The reservation is plagued with chronic unemployment, which averages about 65%. The per capita income was $3,339, and ranks Rolette County as one of the lowest in the State of North Dakota. Our population is young with 42% less than 16 years of age and a median age of 19.5 years.

In 1882, President Chester Arthur by Executive Orders reduced the size of our reservation from an approximate 24 by 32 mile reservation to a mere 6 by 12 mile reservation. By this action, a tract of country estimated to contain over 9 million acres was thrown open to white settlement. As a result our land base was severely reduced. Turtle Mountains has 36,101 acres of tribal land, 40,000 acres of individual allotted trust acres in the immediate service area, 8,890 individual allotted trust acres in western North Dakota and 123,372 individual allotted trust acres located within 12 different counties in the state of Montana. 76% of our land holdings are outside of the reservation boundaries.

The Tribe land is not rich, fertile land, nor do we have any oil, gas, or valuable minerals. There are Tribes who have oil and gas, forestry, fishing, etc., while others like ours have little or no resources available to provide Tribal revenue. Due to our large population and housing shortage, much of our Tribal land is utilized for homesites. Income from our Tribal land is therefore non existent.

The Bureau of Indian Affairs in a Budget Allocation meeting with the Turtle Mountain Tribal Council on April 19, 1989, informed the Tribe that they must be cut $66,200 while the BIA increased their budget by $66,200.

The Tribal Council questioned the BIA's method of allocating monies under the Indian Priority System because we believe funding for the Turtle Mountain Band of Chippewa is grossly inequitable. For example, in FY 1989, the average IPS dollar per person for Turtle Mountain was $320.34 which ranked 10th out of the 12 Aberdeen Area Agencies. The high in the area was $1,109.43 per person. Our Law Enforcement Department and Tribal Court has the 2nd if not the highest incidents of need per month in the Aberdeen Area and ranks 12th out of the 12 Agencies with $47.40 per person in law enforcement dollars. This compares to $294.50 for the high Agency.

We are incensed by these proposed cuts as they mean less money for scholarships, our local community college, fire protection, law enforcement, Tribal court system and other programs crucial to the stability of our Tribe. For too long, the BIA has manipulated the Tribal budget by pulling programs off the system at random to cover the BIA Central Office's shortfalls or favorite projects without consultation with affected Tribes. In addition, it is a known fact the underfunding creates a "divide and conquer" mentality which is not conducive in promoting Tribal unity. For example, each year when the Tribal Council, BIA and all the programs under IPS meet to rank the programs based on need and then attempt to allocate the dollars proportionately, there has never been an adequate amount of money to justify the internal friction created by the system. However, the BIA has repeated encouraged this type of reaction by its inept method of funding.

It is interesting to note the BIA's FY 1990 budget justification to Congress lists the Bureau's budget at nearly $1.5 billion. The amount of funds available to Tribes under IPS is $2.5 million. This calculates out to 17% of total allocated funds for the Tribes to promote self-determination. These figures speak for themselves. How can Tribes exercise true self-determination when the Bureau allows us only 17% of the Bureau's overall budget?

The Indian Priority System causes political and internal problems for the Tribal government and program BIA personnel due to everyone trying to increase their program to meet minimum needs, when in fact, the base amount of funds are not available to meet these minimum needs.

The lack of resources and isolation from metropolitan areas also creates high unemployment and problems of socio-economics associated with poverty on our reservation. It is with this in mind, we contend that not only is the Turtle Mountain Band not receiving equitable IPS funding, but the entire Aberdeen Area Tribes as well when compared with Tribes from the other areas. This is certainly true when one considers the resources available to the Tribes in the Aberdeen Area. As stated before, Turtle Mountain does not have oil and gas, forestry, fishing and other natural resources available to them. Instead our resource is our human potential.

Therefore, how are we, as elected officials, capable of judging what is considered to be the most pressing needs of our Tribe when every one of the IPS programs is essential to our survival? I would like the Committee to bear in mind some critical questions which need to be addressed by the Bureau.

1) If the BIA is requesting $1.5 billion for FY 1990, why is Turtle Mountain's IPS projected allocation only $3 million?

2) From all of the research we have been conducting on the BIA's method of formula funding, we cannot make heads or tails of how they ever came up with the money allocations to the Area Offices and the respective Tribes. For example, in 1978, the Tribe had 28 programs under IPS with a budget of $4, 670,000 now in FY 1989, we have 15 programs with a total allocation of $3,097,000. How did this formula come about? Was there any consideration given to population increase?

3) Why is the Turtle Mountain Band of Chippewa Indians, the only Tribe in the country, who still has their enrollment under the BIA, and why do we need to include enrollment in the IPS funding? This is a direct Bureau responsibility, therefore it should not be included in the IPS allocation. We request that Congress mandate the BIA in removing our Tribal enrollment for the Indian Priority System and appropriate sufficient funds to maintain the Turtle Mountain membership roll.

4) If the BIA had a buget nation wide of $1.1 million for FY 1989 for Community Fire Services, why did the Aberdeen Area receive only $53,000 and Turtle Mountain only $10,000?

5) Under the FY 1990 budget, a $3 million increase is being allocated to Social Services (Indian Child Welfare), why isn't the Turtle Mountain Tribe not receiving any portion of this? It is my understanding this allocation is nation wide.

With the number of child abuse cases which have been investigated on our reservation, doesn't anyone in the Bureau realize we also need additional monies to address those needs?

6) There are two programs which will also be discussed today. Those two programs are no longer a part of the IPS, but are now under the unbanded (non-IPS) funding system. Why is it, that when a program is taken off the IPS, it loses dollars instead of maintaining or increasing? The programs I'm referring to are the Roads Maintenance Program and Facility Management. In Facility Management under another new Bureau formula funding methodology, the Tribe stands to lose $380,000. If this funding methodology is utilizing the current IPS funding formula, you and I both know, that again, Turtle Mountain is getting the short end of the stick. My question is, how did the Bureau come up with this funding formula for Facility Management and how can we change it? And,

7) Why does the Bureau mandate Agency Administration and Executive Direction Programs be maintained under the IPS? These programs should be taken off and funding for their continuation be obtained elsewhere.

Mr. Chairman, the Turtle Mountain Band of Chippewas are tired of being the nice guys, sitting back in a rural, isolated area of North Dakota, not making waves, trying to make do with what we get. However, we have now reached our limit of tolerance. We can no longer abide with the Bureau's base funding formula that they have determined for us. As you listen to the following, you'll understand why we are angry and are seeking your assistance in securing an equitable funding base.

1. Education

a) Scholarships

The present FY 1990 budget is not enough to fund the average submittal of 700 applicants annually. This appropriation can only serve 250 or 36% of the applicable students, 64% are not funded. In the past three to five years, the average cost of college tuition and fees have increased by a $1,000 a year, but BIA Higher Education Scholarships monies have remained the same.

As noted earlier, we have a young population, with many of our young people entering school age. Since the Turtle Mountain Band of Chippewa's resources are human, educational attainment has been our avenue in seeking self-determination. Unlike many non-Indian rural communities we don't have the out-migration or brain drain of our educated Indians. Instead, our people once educated return to our reservation communities to serve the people in the fields for which they were trained.

b) Adult Education Development

This programs provides Pre-College Preparation, GED High School Equivalency, Pre-GED and Literacy Education.

- In a recent Tribal survey of 600 adult residents, it was revealed that 52% did not have a high school diploma.
- The Turtle Mountain Indian Reservation has a population of approximately 13,000 members, of these over 50% are estimated as not having a high school diploma.
- Approximately 6 out of 10 high school students entering the local high schools as freshmen do not complete high school.
- Over a 10 year period, 2,312 adults have enrolled in the Adult Education Program. Of this total, 1,809 have yet to complete their GED.
- Rolette County Job Service revealed that 38% of their caseload clients are lacking a high school diploma. Approximately 10% of these never reach the 8th grade.
- Financial assistance is desperately needed to alleviate some of the problems which hinder the Adult Education/GED student from completing or entering the program, such as transportation and child care expenses. We need the facilities and free services of daycare which would enable our students to complete their educational programs.
- 80% of the participants who are served each year are below the 8th grade level in reading, math and language skills. We need to hire professionals who are trained and qualified to work with the illiterate and disabled adults.
- We need to provide a homebound program of instruction for those adults who are unable to attend regular class sites. More staff is needed to accommodate these adults.

c) Tribally Controlled Community College (TCCC)

Turtle Mountain Community College's mission is toward becoming a self-supporting, full service, participating community college. To serve this mission, the following objectives need to be addressed:

- Improve Administrative Capabilities.
- Improve Instructional Capabilities.
- Improve Student Services Capabilities.
- Expand a Comprehensive Learning Center.
- Expand a Library and Institutional Media.
- Establish an Endowment Fund for the College.

Another Turtle Mountain Community College mission is to establish a Tribal institution involved in exerting leadership within the communit providing service and preserving cultural and social heritage of the Turtle Mountain Tribe. To serve this mission, the following objectives need to be addressed:

- To provide a basic curriculum on Tribal Government, History and Indian Law and provide outreach support services to Tribal Government Committees, forums and Tribal election management and processes.
- Help Achievement of Economic Self-Sufficiency by providing micro and macro economic instructions, on-the-job training and job placement.
- To assist in Tribal research and development, economic development and planning, consulting services, feasibility studies and socio-economic recognition awards.
- Serve as an institution of social change by providing discussion forums, announce opinions through the media, and serving on social uplift committees and as a model of community institutions, leadership and positive social change.
- Basic management support including administrative instructional fiscal management, student services, facility and maintenance, technical assistance in program development and public relations.

d) Adult Vocational Training - Direct Employment

Applications for vocational training have increased. For this year alone, FY 89, there have been 800 contracts from people interested in vocational training. 250 actual applications received Adult Vocational Training (AVT) funding. The number of contacts have increased 100% since 1984. The AVT Program has and will continue to be an avenue for individuals to learn a trade/technical skill to compete in the job market. We need additional funds to:

- provide assistance to persons who obtain employment off the reservation.
- to raise training allowances to cover inflation to shelter rentals, movement of household goods, food, transportation, and in general everyday living expenses.
- to provide for retraining of individuals; our concentration has been to provide initial training.

The Turtle Mountain Bureau Agency's Employment Assistance Program has been reduced $309,700 since 1983. The FY 1983 base budget was $804,900. We need restoration of that amount to:

- Direct employment services for 150 individuals.
- Serve 60 additional adult vocational students.

- Increase student living allowances (inflation equalizer).
- Tribal short term training program.

II. Judicial/Social Services/Tribal Court

a) Tribal Court Program

Much of the Tribal Court work flow involves offenses and and delinquencies relating to alcohol and drugs, with alcohol related offenses being more prevalent. The work flow is divided into 3 areas: Criminal, Civil and Juvenile. Due to staff shortages, one third of all the cases are not heard in court. With each case there should be a guardian ad litems appointed. At the present time, the Court is under-staffed, ranging from judges to process servers, which is a direct result of under-funding. Our Tribal Court needs:

- An Adult Probation and Parole Department for monitoring individuals placed on probation. At the present time, we have no direct supervision capability.
- An investigator to investigate actions that have been filed by the Prosecutor's Office. With the Prosecutor's heavy schedule, he is unable to do the investigative work.
- Social workers to do the necessary investigations and assessments in the juvenile cases other than abuse and neglect. Because of social services' caseload, the Court is unable to utilize their department in this area. This particular area involves custody hearings between two parents.
- Guardian ad litem to assist the Court in cases filed involving minor children. At present, the child does not have anyone representing his/her best interest.
- A Public Defender to represent indigent Indian people as called for under new federal legislation.
- Training for all Court personnel needs to be addressed for for the purpose of keeping abreast with new laws and new techniques in performing assigned duties.
- Because of the complexity of cases and federal regulations calling for accountability, there needs to be a law library available to the judicial personnel for research purposes.

b) Law and Enforcement

The BIA has 9 officers, 2 criminal investigators, 2 clerical assistants and 3 combination jailers/dispatchers to maintain law and order for approximately 13,000 people.

The Turtle Mountain Agency Law Enforcement Department responds to 6500 incidents per year with approximately 325 major crimes per year which includes sexual abuse cases.

Isolation from the Federal Court system creates scheduling and budgetary problems when officers and other personnel have to travel 350 mile trips and be gone 2 to 4 days for detention hearings, bond hearings, grand jury, appeals, actual trial and post sentencing, etc. The Bureau has to pay overtime to cover these officers and high travel expenses to take a perpetrator through the Federal Court System.

In the Belcourt area, there are approximately 12 housing sites scattered thorughout the reservation. Statistics show that the prevalence of crime and delinquency occurs in highly populated areas where people live in close quarters. 9 police officers assigned to our Agency can no longer provide adequate coverage to the reservation In a 24 hour period, the police respond to approximately 35 calls per hour.

Because of a safety factor, it is desirable to work 2 police officers in 1 patrol unit, primarily during the busy weekends. Often times when this is done, there is only 1 patrol unit on duty and this is grossly inadequate for responding to all complaints. Within the past several years, our Law Enforcement Program has been greatly hampered by an insufficient budget. Monies were not only insufficient to hire a full staff, but also to maintain the BIA motor vehicles, ammunition shortages, inability to purchase radios for the cars, inability to replace worn out equipment and insufficient funds with which to purchase complete uniform packages for enforcement personnel (good winter weather gear, etc.).

Due to the size of the police department's detention facility, which has increased from approximately 6,000 square feet to aproximately 14,000 square feet, there is a need for additional heating and maintenance costs along with adequate personnel to cover 3 shifts per day. At the present time, the jail is operating with only 3 detention personnel. These 3 employees must act as both jailers and dispatchers. There is a need for 7 more people in this area.

c) Social Services

The BIA's Social Service Department provides services for 1,610 caseload persons with 4 general assistance case workers. Last year the Bureau had 197 reported child abuse/neglect cases with only 2 child welfare workers investigating these reports. Statistics show that it takes an average of 11 hours to investigate 1 case and this does not include the time it takes to work with the child and parents on treatment, planning, reunification, etc. The Bureau staff also services 24 children who are in out of home placements and supervises 14 county subsisted children in foster homes.

In FY 1989 to present, the Bureau has been only able to investigate 22 of the reported child abuse/neglect cases due to the lack of insufficient staff and supportive service. Our Social Service Program projects a deficit of $34,000 for FY 1989 and will have to eliminate 1 General Assistance and 1 Child Welfare worker.

It is our contention that in order to effectively investigate child abuse/neglect reports, there needs to be an additional 4 more workers: 2 in Foster Care, 1 Abuse Investigator and 1 Secretary. Additionally, with proper funding, the Social Service Department would be able to process their workload of 841 cases.

d) Indian Child Welfare Act

Under the FY 1990 budget, a $3 million increase is being allocated to Social Service (Indian Child Welfare) and it is our understanding that this allocation is nationwide. The Turtle Mountain Tribe is not receiving any portion of this to address our high number of child abuse cases. In addition to the budget reductions in Social Services, we have recently been informed our Indian Child Welfare grant has been discontinued.

III. Tribal Community Services

a) Fire Protection

Our Fire Department consists of approximately 20 volunteers. Over the years, 3 major problems have been identified:

1) The Tribe has been operating the fire department, and the BIA has a trust responsibility in this area.

2) Although $10,000 was provided for FY 1989, it did not adequately provide for supplies, maintenance, operation money, fire fighting equipment and allowances for training the volunteers to combat structural fires. Most of the training is for suppression of grass and bush fires.

3) When fighting a fire, time is of the utmost importance.

> Since many of the reservation fire volunteers live a distance from the fire station, response time is slow and oftentimes the entire structure is lost.

According to the BIA 1988 records, there were 365 grass and bush fires and 79 structural fires. There are now over 5,000 homes on the reservation, many businesses and government buildings rely upon the volunteer fire department.

b) Environmental Quality Services

The Environmental Program is in serious trouble due to lack of funding from the BIA. We are not experiencing cutbacks as such since this program has never had a real funding base from the Bureau. It has been a hit or miss process of several thousand dollars at a time from various sources and it totally unreliable. This is an unfortunate situation since it will mean that Tribes will not be able to participate in thee Environmental Protection strategies that have been recently enacted by Congress through the Clean Water Act. This will occur because it is required for Tribes to have staff, laws and ordinances in place before they can qualify for most of this funding. This is the same funding that all 50 states now receive.

By not allocating funds for Environmental Protection, the BIA is effectively circumventing the intent of Congress to "treat Tribes as states" directly through the Clean Water Act. It is very difficult, if not impossible, to create the necessary infrastructure for environmental protection, while being hobbled by the inadequate support of the BIA. The reasoning is obvious in this situation. If the Tribes are shown to be incapable of administering their own environmental programs, then obviously it would be up to the BIA to administer those federal dollars that will be generated by Congressional Acts.

This Tribe's efforts are surviving to date only through creativity in finding minimal outside funding sources. If it had been up to the BIA at Aberdeen and Washington levels, this program would have ceased to exist years ago.

c) Agriculture

American Indian cultures continue to reflect the importance of agriculture in the daily and spiritual lives of the descendents of America's earliest farmers. In the Turtle Mountain Reservation today, agriculture plays a major role in the social, cultural and economic well being of the Turtle Mountain people.

The Branch of Land Operations was reduced $30,000 from FY 1989 to provide funding to a more critical area. This cut eliminated the Professional Soil Conservationist and left one position to manage the entire program.

d) Forestry

The Tribal Forestry Department has 8 management programs, of these, reforestation is highest on our priority list. We have on the reservation an over abundance of Aspen at or near rotation. The BIA has done little to change this situation and as a result of their negligence, we have a severe problem with fire and no product with which we could create employment. The Tribal Forestry Department has been (over the last 5 years) correcting this problem through reforestation and this needs to continue without the worry of budget cuts.

IV. Bureau Programs

a) Facility Management

The Branch of Facility Management has been funded up to this year based on square footage maintained. We have been informed that the 1990 funding will be based on a new formula that is very complex. Here in the field, we have not received adequate information in a timely manner, consequently, the complexity of the formula disallows us the opportunity to provide the information needed to receive a fair distribution of funding.

The result on a preliminary run indicated the Aberdeen Area will stand to lose $1 million on the proposed formula. Out of the $1 million, Turtle Mountain will lose $380,000.

b) Roads Maintenance and Construction Maintenance

Our Tribe has increased this program over the past years, utilizing the Indian Priority System in an attempt to attain an adequate funding level. The BIA eliminated this program for the the FY 1989 IPS. As a result, our Roads Maintenance Program lost $30,731 from the Fy 1988 program, thereby reducing our overall base allocation.

The Bureau administration costs continue to grow. Inflation on equipment, gas and oil, tires and gravel also increases costs, yet, our allocations are reduced. Our large and concentrated population creates more road usage than on any other reservation roads in the

Aberdeen area. As a result, more maintenance costs per mile are necessary.

c) Realty

The Bureau provides Realty Services in all of the following areas: leasing of surface and subsurface lands, lease compliance, purchase/conveyance, right of way and probate. The landbase in reference includes 40,000 acres of individual trust, 36,000 of tribally owned land in Rolette County, 8,800 acres located in western North Dakota.

We are concerned about our Public Domain Allotments in Montana, which total approximately 123,000 acres located within 12 different Montana counties. 3 different agencies in Montana that administer the land, claim they have neither the funds nor the staff to administer these tracts. It is our own personal observation, "that our tracts will continue to suffer as long as political pressure forces a priority to the reservation lands where the agency is located".

For example, on May 5, 1989, one of our elder allottees had her son go and check her allottment in Montana. He learned the land was being used and hadn't had a lease since 1967. He talked with the individual using the land and with Ft. Peck Agency, Ft. Peck provided him with reports showing the land had been used improperly. One report indicated 20 dead cows were found, stock chutes and corrals had been built, utility liens were in effect and 100 cows were grazing on the land. When Ft. Peck was requested to go out and investigate, their response was that they didn't even have the gas money to go out and do a routine check.

Without adequate staff for our Realty Department, our lands go unchecked.

d) Credit

The Turtle Mountain Credit Office is responsible for the U.S. Direct Loans, Guaranty Loan Program and the Indian Business Development Grant Programs as well as providing technical assistance in all economic development areas. Due to budget cuts, the Credit Office cannot maintain a full staff to effectively administer the program. Therefore, the individual businessmen and the Tribe are not receiving the full benefits of the program, and without individual Indian entrepreneurship, self-determination will never be realized.

e) Aid to Tribal Government

1) Tribal Operations-Enrollment

In FY 1989, $81,300 will furnish 7 employees in the Branch of Tribal Operations. Additional funding for FY 1990 is $84,000 and without this additional funding, 5 employees will be terminated. This reduction will affect the services provided to 26,000 enrolled members and descendents and will greatly hamper the the processing of enrollment applications and blood degree certificates.

f) Individual Indian Monies/Financial Trust Services

The Individual Indian Monies (IIM) Program was removed from the Indian Priority System in FY 1988. This office has 2 employees who administer over 22,000 Turtle Mountain IIM accounts and they maintain as well as coordinate over 4,200 Turtle Mountain accounts with the Billings Area, Fort Peck and Fort Belknap Agencies. Now, this program is also responsible for the Pembina Judgment Award investments plus assist with the individual pay out.

The Agency informs us that this is one of, if the not the highest, workloads in the Bureau. The amount of monies allocated in FY 1989 of $46,000 was not even enough to cover the salaries of two GS-6 employees. We understand that there are other Agencies who received larger allocations with less workloads.

Mr. Chairman, it was my desire to have provided a Bureau wide overview of the Indian Priority System, however, due to Central Offices and the Area Office's inability to comprehend the funding formula for the budget allocation of that system, we were unable to do so. To paraphrase our Area Director's response when questioned on the IPS funding formula and its allocation to Tribes, he responded by saying, "I don't know, I just don't know". Well, Mr. Chairman, neither do we.

STATEMENT OF W. P. RAGSDALE, DEPUTY TO THE ASSISTANT SECRETARY - INDIAN AFFAIRS (OPERATIONS), DEPARTMENT OF THE INTERIOR, BEFORE THE HEARING OF THE SELECT COMMITTEE ON INDIAN AFFAIRS, U.S. SENATE, ON THE IMPLEMENTATION OF AMENDMENTS TO THE INDIAN SELF-DETERMINATION ACT.

June 9, 1989

Mr. Chairman, thank you for the opportunity to appear at this hearing on the implementation of last year's amendments to the Indian Self-Determination and Education Assistance Act in P.L. 100-472 and P.L. 100-581. We believe the hearing will assist in the eventual revision of the regulations implementing that Act as amended, as well as review some of the issues and requirements in the Amendments. We hope that this discussion will lead to close cooperation among the Congress, the Indian tribes, and the Executive Branch in working to implement the goals of the Act.

REGULATION DEVELOPMENT PROCESS

P.L. 100-472 signed into law October 5, 1988, required that implementing regulations be promulgated within 10 months of enactment and contained prescribed bench marks within that timeframe for the participation of Indian tribes, for presentation to the Committees of Congress, and publication as proposed rule-making. Also, concomitant with tribal participation is the effort requested of the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) in this Committee's report on the bill that became P.L. 100-472 (Report 100-274) to develop joint regulations. Meaningful participation, as well as producing joint regulations, is a formidable undertaking that requires cooperation, tolerance, negotiation, and above all, time. Moreover, the normal steps and requirements for clearing important lengthy regulations such as these are time-consuming in themselves and this will be especially true because the amendments extend the provisions of the Act to programs outside of those in the BIA and IHS.

For the past several months we have been participating with the IHS and tribes and tribal organizations discussing differing views on issues to be addressed in the regulations. At the request of the tribes and tribal organizations we revised our initial plans for consultation and proceeded with a process that allowed for more face-to-face tribal participation. We feel that tribal participation in this joint regulation writing process, including two national workshops, resulted in extensive and positive discussions about the issues and the policies arising from this legislation. The process also included two rounds of area meetings where BIA/IHS tribal participants reviewed information compiled at that point in the process.

Frankly, tribal participation has required significantly more time than initially planned. As a result, a revised schedule which was discussed with IHS and tribal representatives, is attached. As you can see, this schedule goes far beyond that in the Act. Nonetheless, as you indicated in your January 3, 1989 letter, tribal participation is necessary and warrants additional time. The tribal representatives also indicated that the time it takes to publish regulations is not as important as maintaining the participatory process.

Although the Act provides for waivers of contracting laws or regulations and states that (except for construction contracts) the Office of Federal Procurement Policy Act and Federal acquisitions regulations promulgated thereunder shall not apply to self-determination contracts, it does require that "all Federal requirements for self-determination contracts and grants under this Act shall be promulgated as regulations". Obviously, this also makes an impact upon the time it takes to write regulations because the Act does not relieve the Bureau of program responsibility.

Accordingly, the minimum standards required by the Secretary for each program to be contracted must be a part of the regulations. Those program requirements will be one of the bases for insuring that the service to be rendered for a particular program or function will be satisfactory; that there is adequate protection of the trust resources, and that the proposed project or function to be contracted for will be properly completed or maintained by the contract. As you can understand, developing the standards for inclusion in the regulations as well as coordination and consultation about those standards is a large and time-consuming undertaking in itself.

LIABILITY INSURANCE

The Self-Determination Amendments also require that the Secretary procure liability insurance, on the most cost-effective basis, for tribes, tribal organizations, and contractors pursuant to the Act. The amount of liability coverage required, the scope and diversity of the Bureau's programs, and the potential adjudication of tort claims in tribal courts, raise complex questions yet to be resolved.

During preparation of the FY 1990 budget request, discussions on this provision of law were held with the Department of Justice, the OMB, and IHS. Due to a number of concerns raised in these meetings, the Administration, as part of the FY 1990 budget request for the BIA and IHS, has requested a one-year delay in the effective date of this provision of law.

In the meantime, the Bureau has obtained some preliminary estimates for commercial liability insurance for tribal contractors and has requested information from our field offices upon which to base estimates for motor vehicle coverage. We will be including in our FY 1991 budget request to the Department funding to implement this provision.

DEMONSTRATION PROJECT

This Committee initiated the enactment of Title III of the Act which directs the Secretary of the Interior to select twenty tribes to participate in a five-year Tribal Self-Governance Demonstration Project. It further states that the ten tribes successfully completing planning grants for this purpose in FY 1988 should be selected as ten of the twenty to participate in the Project if they so desire.

A primary purpose of the Demonstration Project is to allow tribes to enter into unique and individualized written agreements with the Bureau. These agreements would set out the services, programs, and functions which the tribes would perform under such agreements rather than utilizing the traditional contracting process to operate programs formerly administered by the Bureau. No agreements have been proposed by any of the tribes selected for negotiation with the Bureau.

In conjunction with the authorization contained in Title III, in FY 1988, Congress appropriated $1,000,000 to the Bureau to provide planning grants to ten specified tribes. The purpose of those grants as stated in the House Appropriations Committee Report was as follows:

"The $1,000,000 shall be provided under the contracting and granting authority of P.L. 93-638, as a planning grant, to the ten tribes for legal and budgetary research, internal tribal government planning and organizational preparation, and the negotiation process." Based on this language, ten planning grants were made of $100,000 each. The appropriation report language along with certain reporting requirements incorporated in the grant agreements formed the basis for activities to be performed under each of these grants.

In FY 1989, nine of the ten tribes received second year planning grants of up to $100,000 each to continue the activities started in FY 1988. The Bureau received an additional appropriation of $1,200,000 in FY 1989 "to continue second year planning funds for those tribes needing additional planning, and to allow several new tribes to begin planning efforts in fiscal year 1989."

To date, in FY 1989, five additional tribes have been awarded planning grants under a competitive process from a total of forty-four (44) tribes which applied for grants. One or two more grants will be awarded this year. The Bureau has not requested funding for this program in FY 1990.

TRANSFER OF INDIRECT COST RATE NEGOTIATION FUNCTION

The transfer of the responsibility for negotiating indirect cost rates (including but not limited to those for P.L. 93-638 contracts and grants) from the Office of the Inspector General (OIG) to the Office of the Secretary was first proposed in the Department's FY 1989 Budget and was proposed again in the FY 1990 Budget.

The reasons for proposing the transfer are:

1. The function is a program operating function and not an auditing or investigative oversight function and, therefore, should not continue to be located in OIG.
2. Locating the function in OIG does not provide a separation of the performance of the function from the auditing of that performance in order to guard against fraud, waste, and abuse. The current method of operation is contrary to the principle of separation of duties under OMB Circular A-123, Internal Controls, as well as the General Accounting Office's Standards for Internal Controls in the Federal Government. Also, having the OIG both perform the function and audit is counter to the express intent of the Inspector General's Act of 1978.
3. Although initially the indirect cost function was performed by audit offices at most Federal agencies, currently the Department of the Interior is the only major agency in which the OIG still has the responsibility for conducting the indirect cost negotiations.

The OIG would, of course, continue to be responsible for auditing the performance of the office that would be conducting the negotiations just like all other Departmental programs.

The transfer includes responsibility for negotiating all indirect cost rates from Tribes, Tribal entities, Alaska Native organizations, territorial governments and some state agencies. This may total about 400 proposals to be negotiated in FY 1990, or a projected increase of 89 over the current estimate of 311 proposals for FY 1989. In FY 1988 there were about 180 indirect cost proposals submitted by the tribes or approximately 60% of total proposals received by the OIG. The number of tribal proposals is expected to increase with additional applications by the tribes and tribal entities for P.L. 93-638 programs as recently amended.

Within the Office of the Secretary, the Office of Acquisition and Property Management has been designated as the office to assume the indirect cost rate negotiation responsibility. The House Appropriations Committee Report on the FY 1989 Interior and Related Agencies Appropriation Bill directed the Department to consult with the Tribes about the proposed transfer.

The Department's consultation team has been engaged in extensive consultations with the tribes. The team participated in the two national workshops on implementation of the P.L. 93-638 amendments where they had an opportunity to discuss with tribal representatives the proposed transfer of the indirect cost function. In addition, the team held a total of 12 area consultation sessions with tribal leaders focusing specifically on the transfer. The sessions were held as follows:

BIA AREA OFFICE	LOCATION	DATES
Billings	Billings, MT	March 13-14, 1989
Albuquerque	Albuquerque, NM	March 27-28, 1989
Navajo	Gallup, NM	March 29-30, 1989
Muskogee	Muskogee, OK	April 10-11, 1989
Anadarko	Oklahoma City, OK	April 12-13, 1989
Minneapolis	Minneapolis, MN	April 17-18, 1989
Eastern	Arlington, VA	May 3-4, 1989
Portland	Portland, OR	May 11-12, 1989

Phoenix	Phoenix, AZ	May 15-16, 1989
Sacramento	Sacramento, CA	May 17-18, 1989
Juneau	Anchorage, AK	May 22-23, 1989

All tribes and tribal organizations were invited to participate in the consultation sessions. The sessions were attended by a total of 332 individuals representing 201 tribes, tribal organizations, and Alaska Native corporations. The team made a record of the issues and concerns raised by the tribal representatives at each session and shared that information with the attendees in subsequent sessions. We expect to continue to consult with the Tribes, Territorial Governments and State agencies affected by the proposed transfer and will respond to additional issues raised by the Tribes or others during those consultations. The Department is very sensitive to the concerns raised by the representatives of the Tribes and will work with them to ensure that the the transfer is made as smoothly as possible.

CONCLUSION

We will continue to work with the Congress and Indian tribes to fully insure the goals of the Act and to carry out our responsibility in implementing these goals. It is through oversight hearings such as this that the far reaching and complex requirements of the Act as well as the concerns of the Committee and the tribes can be identified so that we may all work together to insure that such concerns are identified and addressed.

This concludes my prepared statement. I will be happy to respond to any questions the Committee may have.

BIA
REGULATION DRAFTING SCHEDULE
MAY 23, 1989

4/5 THRU 6/30	Review draft regs with Work Group
7/3 THRU 7/14	IHS/BIA combine draft regs & review joint draft regs with AS-IA and Director, IHS
7/17 THRU 7/21	Reproduce and mail joint regs to IHS/BIA/Tribal officials
7/24 THRU 8/11	3 weeks to review draft regs before joint 8/11 IHS/BIA/Tribal Area meetings
8/14 THRU 8/18	Joint IHS/BIA/Tribal Area meetings to review draft regs and receive written comments
8/21 THRU 9/8	Revise draft regs based on Area meetings and written comments
9/11 THRU 9/15	Prepare draft regs for Department review and send draft regs to tribes. Submit forms for clearance under Paperwork Reduction Act.
9/18 THRU 11/17	Submit draft regs for review by Department and provide a bi-monthly Sharefax update on the process
11/20 THRU 1/3/90	Submit regs to OMB for review
1/4 THRU 1/11	Revise draft regs as required
1/12 THRU 2/12	Submit draft regs to Congressional Committees
2/12 THRU 2/16	Continue clearance process and prepare joint regs for publication
2/16	Publish Notice of Proposed Rule-Making in Federal Register
4/16	End of comment period
4/17 THRU 5/18	Analysis of public comments and revisions of regs. Develop final regulations, clear regs with AS-IA and Director, IHS.

5/21 THRU 8/10	Final regs in Department & OMB for clearance
8/13 THRU 8/17	Prepare final regs for publication
8/17	Publish final regs in Federal Register
9/17	Effective date of regulations

STATEMENT OF THE DIRECTOR
OF THE
INDIAN HEALTH SERVICE

Mr. Chairman and Members of the Committee:

I am Dr. Everett R. Rhoades, Director of the Indian Health Service (IHS). I am accompanied by Mr. George Buzzard, Associate Director, Office of Tribal Activities, and Mr. Tom Shoe, Director, Grants and Contracts, Public Health Service who is now Acting Director of the Division of Grants and Contracts, IHS. We are pleased to be here today to discuss with you IHS' implementation of the amendments to the Indian Self-Determination Act.

The goal of the IHS and tribal health administrators is to raise the health status of approximately 1 million American Indian and Alaska Native people to the highest possible level. In order to achieve this, IHS has a multifold mission: to provide or assure the availability of high quality, comprehensive, and accessible health services; to empower Indian communities to take individual responsibility for individual wellness; and to provide increasing opportunities for Indians to administer their own health programs; and to serve as a health advocate for Indian people.

The Indian Self-Determination and Education Assistance Act (Public Law (P.L.) 93-638) of 1975 provided a mechanism for the transfer of programs and functions performed by the IHS and the Bureau of Indian Affairs (BIA) to those tribes electing to do so.

In the 14 years since the passage of this landmark piece of legislation, there has been substantial growth in the number and types of activities and programs operated by Indian tribes and tribal organizations consistent with our goal of entrusting these activities to tribal organizations. At present, tribes administer 52 of 127 service units, 7 of 50 hospitals, 73 of 139 health centers, 2 of 7 school health centers and approximately 250 smaller health stations and satellite clinics. Currently, there are about 350 P.L. 93-638 contracts for health services funded at approximately $178 million and P.L. 93-638 contracts for architectural/engineering and construction services at approximately $29.3 million.

During the past 14 year period of experience and growth, barriers to the full participation of tribes in the delivery of health services were identified. Those barriers included inadequate funding, especially for tribal contractor indirect costs; burdensome contracting requirements; and fundamental complex issues of program divisibility. In a major effort to identify clearly the availability of self-determination financing, we are identifing separate funding for all estimated self-determination activities in FY-1990, including full funding for indirect costs, based on a total of $297 million dollars in expected obligation. The IHS and tribes, as parties to this government-to-government relationship, have worked together to minimize these problems. For example:

- Since 1980, the IHS has issued 24 updated Indian Self-Determination Memoranda which communicate IHS policy related to tribal P.L. 93-638 health administration contracts so all parties can know and understand the process.

- Since Fiscal Year (FY) 1986, the IHS and tribes have participated annually in National IHS/Tribal Consultation Workshops to collaborate on policy development.

- In 1986-1987, the IHS with tribal participation, and after briefing the appropriate Congressional staff, developed and implemented the Resource Allocation Methodology to allocate IHS resources reasonably, rationally, and equitably, and to establish a method for assuring that funding provided by IHS is determined on the same basis for both IHS and tribally operated health programs.

- During FY 1987-1988, four IHS/Tribal Work Groups, "P.L. 93-638 Contracting Process", "Carryover Funds", "Alternate Resources", and "Establishing Selection Criteria for Award Instruments for P.L. 93-638 Programs and Projects", presented recommendations and actions to me and discussed Work Group results at the annual IHS/Tribal Consultation Workshop. Many of these recommendations and actions have now been implemented.

- In FY 1988, the Administration requesting $2.5 million to establish an Indian Self-Determination fund for the transitional costs of initial or expanded tribal contracts, and in addition to the amount requested for tribal indirect costs, the Congress provided an increase of $6 million to address any shortfall - a total of $8.5 million to promote Self-Determination activities. In FY 1989 $12.5 million was provided $5.0 million for Self-Determination Fund and $7.5 million for any shortfall).

On October 5, 1988, the President signed the Indian Self-Determination and Education Assistance Act Amendments of 1988, P.L. 100-472. Beginning shortly thereafter, IHS began the process of developing regulations, as prescribed by the Amendments and as guided by language specifing certain procedural requirements. Attention has been especially directed at carrying out the Congressional objectives of simplifying the contracting process, minimizing reporting requirements, and decreasing IHS control and monitoring of P.L. 93-638 contract programs.

In developing the regulations, IHS is striving to balance tribal sovereignty and increased tribal administration while at the same time maintaining an appropriate degree of IHS involvement and insuring the maintenance of an integrated and cohesive IHS/tribal health care system. The balancing of these very important considerations must be achieved in a way which contributes to the tribal and IHS shared goal of raising the health status of American Indian people to the highest level.

As the implementation process has proceeded, we have found that the regulations development process is taking far longer than either the tribal governments, or IHS would like. I would like to discuss the reasons for these delays with you, as well as the steps IHS is taking to provide to tribal administrators during the interim before the regulations are finalized, and to briefly discuss the major unresolved issues in the draft regulations.

The revisions in the schedule are largely attributable to the extensive consultative process conducted with tribes. We believe that the benefits of this consultative process are so significant that they will prove to far outweigh the disadvantages of the delay. We have employed the usual IHS multi-faceted participative approach wherein all tribal officials were encouraged to participate actively at all significant points in the process.

In this regard, the manner in which IHS has worked jointly with tribal representatives meets the statutory requirement and the spirit of tribal participation, going far beyond consultation. This is in keeping with the growing partnership between the IHS and the tribes, and I believe the result is a level of communication and understanding unparallelled in the history of the IHS.

I would like to briefly describe the participatory process.

Steering Committee - In November 1988, I began development of a National P.L. 93-638 Amendments Steering Committee to oversee the entire process and to make recommendations to me about implementation, and regulation issues.

The Steering Committee includes tribal representatives from each of the 12 IHS Areas, the National Indian Health Board, and the tribal co-chairpersons of the Administrative, Construction, Program, and Resources Work Groups. The Steering Committee also includes representatives of the IHS Council of Area and Associate Directors, and other components of the Department of Health and Human Services, including the Office of the General Counsel. The BIA has an ex-officio representative on the Steering Committee.

This group first met in Rockville, Maryland, February 1-2, 1989 and members of the Steering Committee have periodically advised me. Other meetings are scheduled June 27-28 to review draft specifications for a Notice of Proposed Rulemaking (NPRM); September 18-22 to review results of the joint IHS, BIA, tribal meetings in the Areas and to make recommendations to me on the Joint NPRM; and May 8-10, 1990 to review results of the public comment period and to make recommendations to me about the content of the final regulations.

Area Meetings - The IHS and BIA held a series of consultation sessions with tribes to provide orientation and to hear suggestions and concerns before any drafting of regulations was undertaken. Seven meetings collectively involving over 1300 participants, were held jointly by the BIA and IHS throughout the United States in November 1988. Tribes were encouraged to prepare written comments and recommendations for specific language to be included in the regulations.

Each IHS Area Director held meetings with tribes in their respective Areas in November-December 1988 as part of our initial tribal consultation before developing the process of drafting regulations for the P.L. 93-638 Amendments.

Work Groups - Four IHS/tribal work groups were established to develop specifications for the regulations. The four work groups - Administrative, Construction, Program, and Resources had a total membership of 216 of which 143 were tribal. Each work group met at least twice during December 1988 and January 1989.

The work group reports and recommendations were distributed nationwide to IHS, BIA and tribal officials for review and comment.

Regulations Drafting Workshop - Regulations Drafting Workshops (RDWs) for tribal and IHS, BIA and other Federal representatives were held February 28-March 3 in Nashville (RDW I - 260 representatives), and March 21-24 in Albuquerque (RDW II - 310 representatives).

The RDWs were a unique experience. The participants reviewed, analyzed, and discussed, line-by-line, a 120 page working document composed of the combined reports from the Administrative, Construction, Program, and Resources Work Groups. The resultant RDW II Working Document reflects the views of the majority of the tribal participants, identifies major IHS or BIA concerns with the first half of the Working Document, and contains a number of significant agreements between the tribal and other conference participants. The IHS and BIA are using the RDW II Working Document as the basis for developing a draft Joint NPRM.

A working draft of the Joint NPRM, as requested by tribal officials, will be circulated nationwide in July and discussion at Area meetings in August before it is forwarded by IHS and BIA in September 1989 for review and clearance by the two Departments and the Office of Management and Budget. The NPRM will be forwarded to the for 60 Congressional Committees, before being published in the Federal Register for 60 days of public comment.

Regulations Schedule. Many tribes and tribal organizations voiced their opinion that the original plan did not allow for adequate tribal participation. The schedule was revised to include additional time for extensive, participative and consultation process described above and to have a second round of consultation meetings with tribal leaders around the country to review the draft document prior to submission to our Departments for clearance. This consultation required an additional 4 months. Tribal leaders were asked for advice and a majority favored the extended schedule. Congressional Committees were informed of the delay and indicated that they would accept the revised schedule if it were approved by tribes.
majority favored the extended schedule.

After consulting with officials of BIA and tribal members of the Steering Committee, the schedule was further revised to provide additional time for:

- IHS and BIA to prepare the specification for a draft NPRM
- Tribal participation in reviewing the draft specifications
- To meet minimum time requirements for clearance of a draft NPRM by Departments, OMB, and presenting the NPRM to Congressional Committees

Interim Simplification Measures. Because of the delay in promulgating regulations, it is essential to continue prior IHS efforts to simplify administration of the Indian Self-Determination program. To this end, I have issued instructions to our Area Offices on two provisions. Instructions on other provisions which can be instituted before regulations are issued and are also being proposed in concert with advice from our General Counsel.

In addition, by August 31, we will identify from the draft NPRM other provisions that simplify the contracting process and decrease reporting and IHS approvals. These provisions will be incorportated into individual contracts with the approval of the P.L. 93-638 contractors.

Issues to be Addressed. The consultative process has resulted in agreement on a large number of provisions to be included in the NPRM although the IHS, PHS and BIA staff participants expressed their concerns and reservations with many elements in what is basically a document reflecting tribal positions. There remain a number of major issues where agreement was not reached. These are difficult issues and others in the department in OMB have not yet had an opportunity to consider and provide advice. Thus, they will not be fully resolved until final regulations are cleared and published. However, in the interest of building a base of understanding, I will outline for you what some of the important areas of differences are.

Contractibility - The first and in some ways the fundamental question that must be resolved as we move into the new relationships occasioned by passage of this Act is clarity of what parts of the IHS program we believe is contractible by the tribes. We believe there are Federal functions which are essential elements of the Federal responsibility and which cannot be turned over to any other entity. An example of one of the Federal functions which are inherently governmental is the allocation of appropriated funds among the various tribes. Another is the administration of Federal personnel and contracting laws including the Self-Determination Act. Another is the formulation of the budget to be submitted annually to Congress, and its execution.

Equally important is the continuing "residual" programmatic responsibility which remains in the IHS regardless of the extent of tribal takeover of their respective programs. This responsibility extends not only to those tribes contracting to manage their own programs, but applies to those tribes choosing to receive services directly from the IHS. This continuing responsibility is firmly based in other statutes but is also contained in the Act itself including: the reassumption authority and the authority to take back retroceded programs; coverage by the Federal Tort Claims Act; responsibility to obtain or provide liability insurance; the requirement that grants and contracts assure fair and uniform provision of services to the beneficiary population; and the charge not to make any tribal health contracts which would impair the trust responsibilities of the Secretary to any Indian tribe or individual.

Embodied in these responsibilities is the continuing involvement of the Federal government to raise the status of health of the Indian people to the highest possible level. In carrying out this responsibility a Federal presence, including administrative and program specialists, will be necessary.

We will be proposing language that either lists or gives guidance on identifying the inherently Federal functions and residual programmatic responsibilities. We will continue to consult with tribes to agree on guidance to be included in the regulations.

Divisibility - Since many programs serve more than one tribe, another issue relates to the divisibility of a program into separate tribal contracts in order for a tribe or tribes to contract for their portion of the overall program. The Act does not permit the IHS to enter into a contract which would impair the IHS trust responsibilities to any Indian tribe or individual. In addition, the Act does not require the IHS to reduce funding for programs serving one tribe in order to make contracting available to another tribe. The IHS, under the law has a continuing responsibility to all tribes involved, including those choosing not to assume direction of their program. When questions of divisibility arise the IHS must carefully consider the effects of contracting on all the tribes involved. It is necessary for the IHS to determine the extent to which any tribe will be adversely affected by a reduction in services as a result of dividing the program.

It is well established by IHS experience that 1800 is the minimum critical service population for the establishment of the usual clinical programs. Efficiency of operation and optimal health provisions cannot reasonably be achieved for programs serving a smaller population. This has been the basis for the establishment of the service unit as the basic organizational operating unit of the IHS. The service unit concept and the unification and integration of programs at the service unit, Area, and National level have played prominent roles in the success of the various IHS programs.

Funding Level - As tribes continue to administer their own programs, many expect that there will be a proportional decrease in the size of the IHS, and that as the IHS shrinks, savings would accrue which would provide the resources needed by tribes to operate programs directly. Though extensive contracting should result in restructuring of the IHS and the freeing up of resources over the long term, the conversion of resources cannot be direct because of residual or core responsibilities assigned to IHS which remain. We will undertake an analysis to determine what staff and funds are associated with residual responsibility.

Thus, the final regulation must assure that IHS can meet its continuing responsibilities while providing all the available IHS resources to which a tribe is entitled. The Amendments set up a mechanism to provide data to Congress each year on the deficiency in indirect costs. Absent Congressional appropriation to fund these deficiencies, the IHS falls into the dilemma of balancing the needs of tribal administrators with needs of tribes choosing to receive services directly from IHS.

The regulation should also provide a fair and accessible appeals process to enable tribes to see and challenge the IHS's identification of available resources.

I should mention that there are additional issues which will require resolution in the implementation of the new regulations. These are all interrelated and each is necessary in its own way for the operation of a successful health care program. They include the question of maintaining: program standards; program data collection and reporting requirements; and quality assurance provisions.

We agree with the necessity of these components. Most would agree that programs operated for the benefit of Indian people must adhere to the same high standards of quality as that available generally and that quality cannot be maintained without standards. In a rapidly changing and complex field such as medical care, the technical standards often change and programs often must operate from premises based on the existing experience in that program. This is done by continually reviewing the experience, evaluating that experience in terms of results of care, and modifying the program depending upon the information obtained.

Most disagreements in these areas center on the collection and reporting of data. The regulation should not define all aspects of data collection and reporting and cannot address the continual changes in these areas. It can establish a mechanism for addressing change and the need for data and reporting. Within the above confines, therefore, I believe the final regulation can and should provide for the exercise of tribal sovereignty and initiative, and reflect local preference and conditions.

Program Standards - Accessibility, comprehensiveness of services, and meaningful consumer input are important considerations in the development and implementation of standards. We will need to reach agreements on how to ensure that appropriate national, State, professional, agency or tribal standards will be used.

Program Data Collection and Reporting - Program data from health programs is essential for: quality assurance; sound program planning; assuring compliance with health standards; determining health status thereby identifying health deficiencies; measuring changes in health status thereby identifying problems and successes and enabling the program to be evaluated; identification of additional requirements; allocation of resources; and budget justification. Again, the question is which data and how much data are necessary as a regulatory specificiation.

Quality Assurance - Again, as above, the regulations will need to specify how tribes will establish and maintain quality assurance programs, including:

(i) self-evaluation and assessment of management and program processes;

(ii) evaluation and assessment of collected information with regards to meeting applicable standards;

(iii) development and implemenation of corrective action plans to bring performance to acceptable levels within the standards;

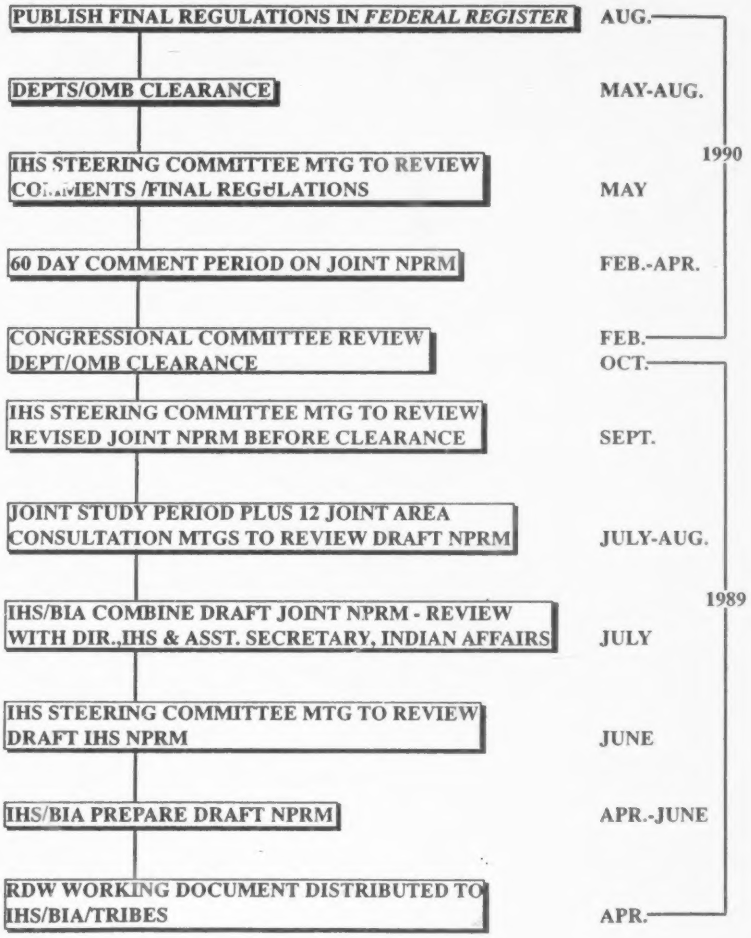
(iv) a risk management plan for health care facilities; and

(v) internal monitoring of the above processes and outcomes.

I believe IHS has made a major effort to consult with the tribes and provide them with the opportunity to participate as well as to increase our collaborative efforts with the BIA. Although the consultation and collaboration efforts provide productive results, they are complex, resource intensive, and time consuming processes.

That concludes my opening statement, Mr. Chairman. I will be happy to try to answer any questions you or the other Committee members may have.

REMAINING REGULATORY PROCESS



PUBLISH FINAL REGULATIONS IN *FEDERAL REGISTER* AUG.

DEPTS/OMB CLEARANCE MAY-AUG.

IHS STEERING COMMITTEE MTG TO REVIEW COMMENTS /FINAL REGULATIONS MAY

60 DAY COMMENT PERIOD ON JOINT NPRM FEB.-APR.

CONGRESSIONAL COMMITTEE REVIEW FEB.

1990

DEPT/OMB CLEARANCE OCT.

IHS STEERING COMMITTEE MTG TO REVIEW REVISED JOINT NPRM BEFORE CLEARANCE SEPT.

JOINT STUDY PERIOD PLUS 12 JOINT AREA CONSULTATION MTGS TO REVIEW DRAFT NPRM JULY-AUG.

IHS/BIA COMBINE DRAFT JOINT NPRM - REVIEW WITH DIR.,IHS & ASST. SECRETARY, INDIAN AFFAIRS JULY

IHS STEERING COMMITTEE MTG TO REVIEW DRAFT IHS NPRM JUNE

IHS/BIA PREPARE DRAFT NPRM APR.-JUNE

RDW WORKING DOCUMENT DISTRIBUTED TO IHS/BIA/TRIBES APR.

1989

P.L. 93-638 AMENDMENTS REGULATIONS DEVELOPMENT

TRIBAL PARTICIPATION PROCESS - TO DATE

RDW II WORKING DOCUMENT DISTRIBUTED TO IHS/BIS/TRIBES	4/89
JOINT RDW II WORKSHOP ALBUQUERQUE, NM 310 PARTICIPANTS	3/89
JOINT RDW I WORKSHOP NASHVILLE, TENN. 260 PARTICIPANTS	3/89
IHS STEERING COMMITTEE MTG 30 PARTICIPANTS	2/89
JOINT AREA MTGS REVIEW WG REPORTS + TRIBAL DOCUMENTS	1-2/89
IHS/TRIBAL WG MTGS ADMINISTRATIVE, CONSTRUCTION, PROGRAM, & RESOURCES OVER 400 PARTICIPANTS	12/88-1/89
12 IHS AREA /TRIBAL CONSULTATION MTGS	11-12/88
12 JOINT AREA CONSULTATION MTSG OVER 1300 PARTICIPANTS	11/88
AMENDMENTS ENACTED	10/88

P.L. 93-638 AMENDMENTS REGULATIONS DEVELOPMENT

NOW LIST

Actions which can be implemented now:

1. **Annual Report to each Tribe**
2. **Carryover**
3. **Annual Report to Congress**
4. **Pre FY 1988 Debt Forgiveness**
5. **365 Day Limit on Disallowance Notice**
6. **Indian Priority System Teams and Reports**

P.L. 93-638 AMENDMENTS REGULATIONS DEVELOPMENT

NOW LIST

Actions which require additional work before implementation prior to promulgation of regulations:

1. **Mature Contracts**
2. **Declination and Approval Time Limits**
3. **Federal Fringe Benefit Retention**
4. **Inter-govermental Personnel Assignments**
5. **Conversion of Indian Preference Excepted Appointment to Competitive Career Appointments**
6. **One Year Retrocession Effective Date & Hearing of Record**
7. **No Adverse Adjustments Due to Underrecoveries**
8. **Adding Indirect Costs Funding to Direct Program Funding**
9. **Hearing on the Record for Reassumption**

P.L. 93-638 AMENDMENTS REGULATIONS DEVELOPMENT

NOW LIST

Actions which cannot be implemented until regulations are promulgated:

1. Grants and Technical Assistance
2. Nonapplication of Office of Federal Procurement Policy Act and Federal Acquisition Regulations
3. Non-Mature Contract Terms of over 3 Years
4. Excess Property Donation
5. Contract Support Costs
6. Prohibited Contract Funding Reductions
7. Indirect Cost for Construction Contracts
8. All Federal Requirements Must be in Regulations
9. Appeals

P.L. 93-638 AMENDMENTS REGULATIONS DEVELOPMENT

IHS/TRIBAL WORK GROUPS -- P.L. 93-638 AMENDMENTS

1. The 4 Work Groups have at least 216 members, of which 143 (66 percent) are Tribal representatives.

2. The proportion by Work Group is:

Administrative	59 members, 46 (78%) are Tribal
Construction	43 members, 25 (58%) are Tribal
Program	64 members, 41 (64%) are Tribal
Resources	50 members, 31 (62%) are Tribal
TOTALS	216 members, 143 (66%) are Tribal

P.L. 93-638 AMENDMENTS REGULATIONS DEVELOPMENT

NATIONAL P.L. 93-638 STEERING COMMITTEE

1. **PURPOSE** To oversee implementation of the Amendments including regulation development, work group products, and results of tribal consultation and participation.

2. **MEMBERS** Consists of 30 members of which 18 (60%) are Tribal (non-Federal) members.
   Includes a Tribal representative from each IHS Area and from NIHB, and Tribal Co-Chairpersons for each of 4 IHS/TribalWork Groups.

P.L. 93-638 AMENDMENTS REGULATIONS DEVELOPMENT

CHRONOLOGY OF SCHEDULE CHANGES

August 5, 1989	Original date.
December 1, 1989	Option B - to give more time for tribal participation.
December 29, 1989	To allow for RDW II and 2 week study period.
August 10, 1990	To provide additional time for: 1. IHS and BIA to prepare draft NPRM. 2. Tribal participation in reviewing draft NPRM. 3. Minimum time required for clearance by Department and OMB and review by Committees.
August 17, 1990	To allow additional time to complete Draft NPRM .

Quinault Indian Nation

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TESTIMONY OF PRESIDENT JOSEPH B. DELACRUZ
QUINAULT INDIAN NATION

BEFORE THE

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

ON THE

TRIBAL SELF-GOVERNANCE DEMONSTRATION PROJECT

JUNE 9, 1989

Mr. Chairman and members of the Committee, I am Joe DeLaCruz, President of the Quinault Indian Nation. I requested this opportunity to appear before you today to offer testimony about developments concerning the Tribal Self-Governance Demonstration Project.

Mr. Chairman, in about a month, the Bureau of Indian Affairs will mark the 157th year since the U.S. Congress formally authorized the President to appoint a Commissioner of Indian Affairs with the advice and consent of the Senate. When the Congress enacted that law on July 9, 1832 it simply said the Commissioner would "have the direction and management of all Indian Affairs and of all matters arising out of Indian relations." In other words, Mr. Chairman, the Congress authorized a kind of "Secretary of State for Indian Affairs," a position in the U.S. government responsible for directing and managing U.S. relations with Indian nations. From that humble beginning, the Bureau of Indian Affairs evolved into an agency of the United States government which exercises extraordinary governmental powers over Indian nations and individual Indian people. While the

Bureau of Indian Affairs exercises broad powers over the lives of Indian people, none of the Indian nations either select or elect the people who wield such powers. This condition has special relevance to developments in the Self-Governance Demonstration Project.

The administrative location of the B.I.A. Commissioner's position has reflected the relationship between Indian nations and the United States. While under the Secretary of War, the B.I.A. served as a diplomatic mechanism for treaty-making; and a mechanism for the U.S. to exercise military rule over Indian nations. Under the Secretary of the Interior, the B.I.A. has served as a diplomatic agency for making treaties, a real estate agency for transferring Indian lands to non-Indian ownership, and a remote governing authority exercising political powers over Indian peoples and their property.

The most precious right of any people is the right to freely govern themselves, to decide freely their own social economic and political future without external interference. For 157 years, Indian nations across this great land have viewed with alarm and dismay, and often passive resignation, the systematic erosion of their powers of self-government. After 157 years, Indian nations no longer fully govern themselves. Those powers which Indian nations regarded as sacred and necessary to life flowed away from them to the U.S. Congress and to the Bureau of Indian Affairs. Those powers were never given to the United States, they were taken.

As the United States government assumed greater governing powers over Indian peoples, loss of self-respect, increased poverty and a general decline characterized once proud and self-sufficient nations. Our nations became for the United States, "The Indian Problem!" Our nations have been the victims of a 157 year hoax - that the United

States would protect and care for Indian peoples. But, instead of recognizing the victimization of Indian peoples, the United States made us the villain, the Indian Problem. Indian people themselves became the reason for our increased poverty, our lack of self-respect and the general decline. The victim was blamed for his own victimization.

Not until 1964, when the U.S. government entered the period of the "Great Society," did the strong yearning to reassume self-governing powers among Indian peoples gain an opportunity for expression. The tight B.I.A. controls over Indians' lives loosened, just a little, when tribes gained access to funds and the power to decide how those funds would be used. Over the twenty-five years that followed the small taste of freedom allowed under Community Action Programs, Indian people themselves began to tackle the poverty, the lack of self-esteem and the general decline that had been such implacable problems for generations.

In a single generation, Indian people have methodically begun to reassume those powers of decision that made our societies strong and prosperous for thousands of years. Step-by-measured-step, Indian nations worked to remove obstructions to the resumption of self-government. Indians built schools where there were none before. Indians established productive enterprises when there were none. Indians established programs to reverse the problem of alcoholism when others had failed. Indians built new homes to make a place for new generations when homes were an impossible dream. Indians moved to preserve and enhance fisheries and replant forests when others over-harvested these resources and complained about their loss. By reclaiming some governing powers, Indian nations were able to do these things. In one short generation and only after regaining a small measure of self-government, Indian people began to rebuild. The modest experiment in Indian self-determination began to produce results. Yet the modest beginning will be quickly reversed if Indian people cannot expand their self-governing powers.

To increase Tribal powers of self-rule, the Bureau of Indian Affairs must relinquish its controls over Indian people. The Bureau of Indian Affairs must enter a period of transition where Indian nations can reclaim their powers of self-government. Through such a transition, the role of the U.S. government in Indian Affairs must be redefined as a protector of Indian nations. It must cease being a controller of Indian nations.

The latest step toward Indian self-rule is the Tribal Self-Governance Demonstration Project. It is a small step, but an important and necessary one. It is a step which opens Indian nations to new challenges and new possibilities. It is the means by which Indian nations can regain their powers of self-government. It will also help establish a working framework for government to government relations with the United States while aiding the U.S. government to reshape the Bureau of Indian Affairs.

Mr. Chairman, the Quinault Indian Nation admittedly embarked upon the Self-Governance Demonstration Project with initial reluctance. Even though I have advocated an effort to move beyond the Self-Determination Act for more than ten years, I must say that neither I nor my Tribal Council was fully prepared to deal with the political complexities created by the self-governance initiative. It is not an easy matter to undertake fundamental political changes in a nation like Quinault. This is especially true when a normal tendency among Quinault people is to keep things as they are rather than make sharply defined changes. While my people accept slow change, rapid political change creates a sense of uncertainty and turmoil. Though the Self-Governance Demonstration Project concerns only shifts of responsibility and funds from the Bureau of Indian Affairs, the B.I.A. involves a great many parts of our life.

In the short span of twenty-two months, beginning in February 1988, the Quinault Indian Nation will have considered the legal, budgetary and structural affects a shift of B.I.A. budgetary and governmental powers will have on the Quinault. The Quinault Council will have considered the implications of reassuming greater powers of self-government, and it will decide whether we will enter into negotiations with the United States to conclude a funding transfer agreement. In those few months, my people must decide whether we will take control over and responsibility for a larger part of our lives. That is really a very short time during which such an important decision must be made.

If this day was twenty years ago, I would say the Quinault people would decide without question to negotiate and agreement to reassume greater powers of self-government. It was just twenty years ago that Quinaults moved individually and collectively with determination to take control over our beaches on the Pacific Ocean to prevent outsiders from damaging that precious resource. If, however, a decision had to be made today, I would not be so certain. The issues and concerns which occupy us now are more complex and less clear cut. The political reality is there are many more Quinaults now, and there are stronger political differences of opinion than twenty years ago. I think these changes reflect important growth among Quinault people. Still, these changes make things less cut and dried.

As I say, I am not certain which way the Quinault Council will decide the question of negotiating a funding transfer agreement with the United States. I do know, however, the Quinault Tribal Council will make a decision in December of this year.

One issue which I believe will heavily weigh on the decision of the Quinault Council concerns the B.I.A.'s good faith. And also I am concerned about the U.S. governments ability and willingness to live up to an agreement with the Quinault Indian Nation. If the Quinault decides to negotiate, will the U.S. negotiating team, formed as it doubtless will be from Interior and B.I.A. officials, negotiate in good faith? What assurances do we have that after negotiating an agreement the B.I.A. or other executive agencies will not attempt to subvert or otherwise undermine the agreement during the demonstration period? How can we be assured that B.I.A. or other officials will not interfere in the internal processes of the Quinault government as we experiment with the self-governance process?

I want to say, Mr. Chairman, I believe any reluctance of tribal councils to negotiate agreements with the United States will be influenced by many years of bad experiences with the B.I.A. When the United States cannot or will not abide by Treaty Agreements made 130 years ago, what evidence do we have that the United States will live up to a self-governance compact? The level of confidence many Indian people have in the Bureau of Indian Affairs is rather low.

At the moment, the Congress has instructed the Secretary of the Interior to enter into negotiations of funding transfer agreements with participating self-governance tribes. I have no doubt that the Secretary will instruct the Bureau of Indian Affairs to conduct those negotiations. It is entirely possible, Mr. Chairman, the Secretary will instruct some B.I.A. officials to sit on a negotiating team who are the same people in whom we have no confidence. The U.S.

negotiating team will, in all probability, include some of the same people who have worked to undermine and defeat the self-governance initiative. How can such a group of people negotiate a Self-Governance Compact in good faith?

From the beginning of the Self-governance initiative in 1987, we have gained ample evidence that while the Congress appears willing to allow Indian nations to reassume increased powers of governance, there is very little evidence the Executive Branch (particularly the B.I.A.) is willing to allow for the transition and transfer. On the contrary, we have more than ample evidence that while B.I.A. officials are willing to agree with the Self-governance initiative in principle, they are not willing to agree to self-governance in practice.

Self-governance tribal officials have met exactly twice with representatives from the Assistant Secretaries' Office since the beginning of the self-governance initiative. We met on January 21, 1988 and January 13, 1989. On both occasions B.I.A. officials advised Tribal Chairmen that the B.I.A. would fully cooperate. Yet, within days following those meetings, we learned of overt and covert efforts by the same officials to subvert the self-governance process. After the Assistant Secretary made promises of cooperation to tribal chairmen, the B.I.A. failed to award grants for the first year of self-governance planning until three months after the agreed date for an award. At the meeting with the Acting Assistant Secretary in January 1989, he assured us of the B.I.A.'s willing cooperation again. After those assurances, the Acting Assistant Secretary delayed second-year grant awards while attempting to redefine administratively the self-governance process into a kind of 638 program. He worked to delay the project further by taking additional time to "seek clarifications about Congressional intent" from the Appropriations Committee.

In the B.I.A.'s 1990 budget justifications, it failed to request appropriations to support the self-governance initiative. The B.I.A. also failed to secure additional appropriations to support self-governance planning for a second-tier of applicant tribes.

In August 1988, I joined with the Chairmen of the Lummi Indian Tribe and the Jamestown Band of Klallam to request the Bureau of Indian Affairs to provide us with specific budget data and the B.I.A.'s budget allocation criteria. Not until November 1988 did we receive a response. Budget information was confused and cryptic - almost unusable. The B.I.A. would not or could not provide information about its budget allocation criteria.

In an effort to aid the process of formulating regulations for Title III, the Quinault, Lummi and Jamestown Klallam offered proposed regulations to the Bureau of Indian Affairs. Initially our proposal was rebuffed. Later there was some indication of B.I.A. willingness to formulate regulations along lines similar to our proposal. Despite this effort, the regulations have not been published.

I have dealt with Bureau officials for more than twenty years, and I have always believed where misunderstandings exist or differences of opinion exist, something can be worked out. The current crop of B.I.A. officials are a little different. They are more ideological. Frankly, Mr. Chairman, I believe B.I.A. officials in the Central Office are out to undermine and defeat the self-governance process. There doesn't seem to be a spirit of willingness to work out misunderstandings or differences. Their cooperation exists in name only. I am not convinced that these officials can or will undertake good faith negotiations with self-governance tribes.

When the Quinault Tribal Council meets in December to decide whether to enter self-governance negotiations, I want to be able to say the U.S. will negotiate in good faith and it will live up to its agreements. Can this Committee give me an assurance that the U.S. government's word will be good, and there will be no efforts to subvert an agreement after it is negotiated? I urge this committee to send a delegation of members to meet with President Bush and Secretary Emanual Lujan to secure formal assurances and commitments to good faith self-governance negotiations. To demonstrate that good faith, I believe the President of the United States ought to appoint a special White House negotiator to head up the U.S. negotiating team. I believe this Committee should urge the President to make such an appointment.

The Quinault Indian Nation has joined with the Lummi Indian Tribe and the Jamestown Band of Klallam to make a good faith effort to assist Key Executive Branch Officials to better understand the intent and meaning of the self-governance demonstration project. We have jointly prepared and issued a "Red Paper" entitled Tribal Self-Governance: Shaping Our Own Future for use in a series of Executive Briefings. It is our intent to form a briefing delegation which will offer briefing sessions to officials of the White House, particularly the Office of Management and Budget. Briefings will also be offered to Secretary Emanual Lujan and senior officials of the Bureau of Indian Affairs.

Since I have proposed that members of this Committee meet with President Bush and Secretary Lujan, I would like to invite this Committee to provide representatives who will join or briefing team. A Tribal and Congressional briefing team would be very helpful.

For your information, I have supplied the Committee with 15 copies of the Red Paper. I request that Mr. Chairman enter its full contents into the record.

As the Committee can probably tell, developments concerning the Self-Governance Demonstration Project have reached a new level. We are at an important stage of decision. The Quinault Indian Nation and other tribes have extended a collective hand to meet the United States halfway. We are uncertain, however, that the U.S. is willing to make good-faith efforts to meet us. My suggestions are intended to secure a more favorable climate for tribes to make a decision. In this the 157 year of the modern operation of the B.I.A., I hope we will see a new spirit throughout the U.S. government to work cooperatively toward the resumption of self-government among Indian nations. I hope the Committee will continue to work with us. Thank you!

Tribal Self-Governance: Shaping Our Own Future

A RED PAPER

Issued By

Jamestown Band of Klallam
Lummi Indian Tribe
Quinault Indian Nation

June 1, 1989

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A RED PAPER jointly issued by Jamestown Band of Klallam, Lummi Indian Tribe, Quinault Indian Nation on June 1, 1989

EXECUTIVE SUMMARY

The three branches of the U.S. government have always been at odds with each other over Indian Affairs policy. Each branch has tended to shift between three policies: Tribal dissolution and termination of U.S. Trusteeship; paternalism, often with autocratic federal control of tribes; and, Indian self-determination. Rarely have all three branches of government shared the same policy at the same time. The resulting erratic Federal/Indian Policy in any given period served neither the long-term interests of Indian tribes nor the United States of America very well.

The tendency for shifting or contradictory U.S./Indian Affairs Policy has long concerned Indian tribes. Since the turn of the century, Indian leaders have worked to promote "adjustments in Federal/Indian Affairs." The underlying themes of evolving Indian tribes' policy have been: The promotion of Indian Rights, fulfillment of treaties between Indian tribes and the United States, and mutual cooperation between Indian tribes and the United States. Erratic U.S. policy shifts combined with tribal rejection of the policies of dissolution and paternalism provided fertile grounds for persistent disputes between the U.S. government and Indian governments. Recognizing this condition, many Indian leaders and some U.S. representatives attempted during the last twenty-five years to define a mutually compatible U.S. policy and tribal policy. Such a policy must be acceptable to at least the Executive and Legislative branches of the U.S. government and Indian tribes.

Since 1970, the Indian Self-Determination Policy has gained increasing acceptance from both the U.S. government and in Indian nations. President Richard M. Nixon affirmed the self-determination policy in the Executive Branch in 1970. The U.S. Congress affirmed that policy by enacting the **Indian Self–Determination and Education Assistance Act** in 1975 (P.L. 93-638) and reaffirmed that policy by enacting many of the recommendations of the Joint-Congressional American Indian Policy Review Commission. President Ronald Reagan reaffirmed President Nixon's policy by announcing his Administration's **government to government** policy in 1983. At each point in the evolution of the Indian Self-Determination Policy, tribal officials and U.S. officials have worked increasingly in concert.

In 1987, tribal representatives and representatives of both the Executive and Legislative Branches of the U.S. government produced an agreement in principle on the **Tribal Self–Governance Demonstration Project**. Enacted as a part of the Appropriations Act of 1988 (See Appendix A) and later supplemented and clarified as Title III (See Appendix B) of the 1988 Amendments to the Self-Determination and Education Assistance Act (PL 100-472), the Tribal Self-Governance Demonstration Project is now the most advanced expression of the policy of Indian Self-Determination. It represents the most recent demonstration of developing cooperation between Indian governments and both the Executive and Legislative Branches of the U.S. government in a process of jointly developed policy. The Tribal Self-Governance Demonstration Project is a clear step toward cooperative policy development. It has the potential of serving the long-term interests of both Indian nations and the United States.

What is the Self-Governance Demonstration Project?

The five-year **Tribal Self–Governance Demonstration Project** has three components: Phase I (Research and Planning); Phase II (Negotiation of Self-Governance Compacts) and Phase III (Execution of Self-Governance Compact). For ten initially participating tribes, Phase I began in 1988.

The Project is intended to formalize government to government relations between the United States government and Indian governments. It enables Indian Tribes to redesign programs, activities, functions or services and to reallocate funds for such programs, activities, functions, or services according to tribal governments' decisions. Furthermore, the Demonstration Project is intended to enable Indian Tribes to plan and deliver services appropriate to the needs of their members, to enhance the ability of tribal governments to determine priorities, to enhance the success and long-term financial stability of tribal governments, and to reduce the Federal-Indian bureaucracy.

The Self-Governance Demonstration Project is intended to promote tribal social, economic and political self-sufficiency through the transfer of most appropriated Bureau of Indian Affairs funds to Indian Tribes and Native groups, increasing tribal accountability through local autonomy, and to reduce the size of the Bureau of Indian Affairs while transforming it into an agency that protects Indian Tribal interests instead of managing those interests.

Summary of Key Legislative Provisions

APPROPRIATIONS LEGISLATION 1987 –1988

1. Ten initial Self-Governance participating tribes (Confederated Salish and Kootenai Tribes, Hoopa Tribe, Jamestown Band of Klallam, Lummi Indian Tribe, Mescalero Apache Tribe, Mille Lacs Chippewa Tribe, Quinault Indian Nation, Red Lake Chippewa Tribe, Rosebud Sioux Tribe, and Tlingit and Haida Central Council) were designated to receive grants from a $1,000,000 appropriation to begin Self-Governance Planning in the areas of legal and budgetary research, internal tribal government planning and organizational preparation, and the negotiation process in fiscal year 1988. Congress appropriated $1.2 million for fiscal year 1989 to support continuing planning by the first ten tribes and several newly participating tribes.

2. The Bureau of Indian Affairs was directed to analyze all budgets and functions at all levels of the Bureau, and to formulate a proposal for the equitable distribution of resources and service responsibilities to initial Self-Governance participating tribes.

3. The Bureau of Indian Affairs was instructed to prepare proposals for reduction or transfer of personnel and consolidation of program functions to accommodate the eventual transition.

4. Each Self-Governance participating tribe and the Bureau of Indian Affairs separately are to document obstacles and proposed remedies identified with the Self-Governance Planning Process.

5. The negotiated agreements between Self-Governance participating tribes and the United States should include a clear delineation of trust responsibility protections assumed by the tribes and those retained by the United States government.

6. The negotiated agreements must include a method for documenting self-governance progress through mutually-determined baseline measures incorporated in each agreement.

AUTHORIZATION LEGISLATION:

1. Besides the ten initial participating tribes, an additional 10 tribes are to be selected from a pool of potential tribal applicants; applicants are selected in a manner to achieve geographic representation. The demonstration initiative is authorized for five years (two years for planning and three years for implementation) to test the concept.

2. The Secretary is directed to negotiate an annual funding agreement (Self-Governance Compact) with the governing body of a participating tribal government which has completed a self-governance planning grant. The Secretary is required to submit a report to the Congress on July 1 and January 1 of each of the five years following the enactment of the Tribal Self-Governance Demonstration Project. The reports must describe the relative cost and benefits of the Tribal Self-Governance Project based on the mutually defined baseline measurements developed by the Secretary and each of the participating tribes. The separate views of participating tribes will be included in each report.

3. After completing the self-governance planning process, each tribe then determines whether to enter into Self-Governance Compact negotiations with the United States. If a tribe decides not to negotiate an agreement, no further steps will be necessary. If a tribe decides to enter negotiations, that process then begins with the Secretary of the Interior. After an agreement has been finalized, a self-governing tribe may retroceed any programs or functions back to the U.S.

4. The Self-Governance Project does not reduce or impair the sovereign immunity of each Indian tribe, nor does it permit the termination of any existing trust responsibility of the United States to any participating tribe.

Current Status of Self-Governance Tribes

Each of the initial ten participating tribes received a starting grant of $100,000 to begin Phase I of the Tribal Self-Governance Demonstration Project in 1988. Each has been conducting internal and external legal and budgetary research, internal tribal government planning and organizational preparations. Each has submitted an *Obstacles Report* to appropriate committees of the Congress on September 1, 1988. All initial participating tribes are continuing planning activities in 1989. It is anticipated that the initial participating tribes which decide to enter into Self-Governance Compact negotiations with the United States will do so in 1989 or early 1990.

Tribal Self-Government and Changes in the B.I.A.

Two commissions, the American Indian Policy Review Commission of the U.S. Congress (1975 - 1977) and the Presidential Commission on Reservation Economies (1984) found that the Bureau of Indian Affairs and many past policies of the United States government stifle tribal efforts to achieve social, economic and political self-sufficiency.

The Tribal Self-Governance Demonstration Project is designed to accomplish a reduced direct Federal involvement in the management of Indian tribes. It is also designed to resolve problems associated with multi-tribe B.I.A. Agencies, reduce the size of the B.I.A. bureaucracy, allow more direct local decision-making by tribal governments, and stabilize the level of B.I.A. appropriated funding. Expectations are that the federal burden for administering many social and economic programs to self-governing tribes would decline over a period of years as functions and resources are transferred through negotiations of a Self-Governance Compact. Correspondingly, the structure of the Bureau of Indian Affairs and its personnel burden should reduce with the conclusion of each Self-Governance Compact. This zero-based approach has the advantage of increasing local decision-making at the tribal level, reducing federal Indian Affairs management functions and emphasizing trust protection responsibilities.

BACKGROUND: Tribal/U.S. Policies

The right of peoples to govern themselves without external interference is a doctrine first codified in the law of nations in the 18th century. U.S. Supreme Court Justice John Marshall applied this doctrine to the conduct of relations between the United States of America and Indian nations in the landmark case of **Worcester vs. Georgia** in 1832. The court declared:

> The Indian nations had always been considered as distinct, independent, political communities . . . and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its right of self-government – by associating with a stronger, and taking its protection. (131 US (6 Pet) 515 (1832) pp. 559, 560)

Indian Nations have always valued the right to govern themselves. In a curious turn of fate, the American Continental Congress depended on this very principle when it shocked the European world with the Declaration of Independence and set in motion political revolutions around the world. The right of distinct political communities to govern themselves has remained a corner-stone of international law and U.S. government foreign policy ever since.

The right of Indian Nations to govern themselves has remained a fundamental principle underlying the relations between the United States and Indian Tribes. The United States government has not, however, consistently lived up to this principle in practice. Instead, the agency responsible for administering relations with Indian Tribes, the Bureau of Indian Affairs, historically obstructed Indian Tribes' efforts to exercise the full powers of self-governance.

Indian Affairs agencies are among the oldest administrative agencies of the United States government. The permanent mission of the Bureau of Indian Affairs was set by an Act of Congress on July 9, 1832. The Congress authorized the President to appoint, with the consent of the Senate, a commissioner of Indian Affairs who would "have the direction and management of all Indian affairs and of all matters arising out of Indian relations." (4 Stat. 564, R.S. Sec. 462-463, 25 U.S.C. 1-2) The B.I.A. has been transformed in 157 years from an agency which administers U.S. relations with Indian Tribes to an agency which governs the internal and external affairs of Indian tribes.

U.S. Policies: From Termination to Local Autonomy

The Congress has always held the primary responsibility for dealing with Indian Affairs. When the states ratified the U.S. Constitution in 1789, the Congress of the United States continued to have that responsibility. Of the three branches of government, the Congress was to hold dominant authority over matters relating to Indian Affairs. In the U.S. government, that central reality has remained unaltered. While this is the constitutionally defined allocation of power, the practical reality of shifting responsibility and authority between the three branches of government is the modern rule.

In the 1871 Appropriations Act, the U.S. Congress ended the making of treaties with Indian Nations. This Act brought to a close more than 250 years of government to government relations with Indian nations by European states and the United States government. The Congress decided it would conduct relations with Indian nations unilaterally through legislation. Its decision also had the effect of directly increasing the already extensive powers of the Bureau of Indian Affairs over the daily lives of Indian people. It is not clear that the framers of the U.S. Constitution contemplated that the primacy of Congress would evolve to the U.S. Congress and an agency of the Executive Branch assuming the direct powers of governmental rule over Indian nations without the consent of Indian peoples. Despite frequent petitions to the Congress from Indian tribes requesting a reversal of this pattern of autocratic rule, little progress was made to reinstate government to government relations. A ray of hope occurred in 1934 when the United States government began to reconsider its relations with Indian tribes.

When the **Howard–Wheeler Act of 1934** (Indian Reorganization Act) was under consideration by Congress, it contained far-reaching provisions to assure Indian self-government. It originally provided that Indian Tribes would have broad authority to fill positions in local B.I.A. field offices, to take over and operate B.I.A. functions and services, and even, by popular vote, to request the discontinuance of any separable function or service in the B.I.A. The noted Indian historian, D'Arcy McNickle and Harold Fey described the scope of the draft provisions in their book, **Indians & Other Americans**. They wrote:

> In the event a function was assumed by the local community, the Secretary of the Interior was authorized to make a legal transfer to the community, including a transfer of funds originally appropriated for the purpose, lands, buildings, and equipment; and thereafter the community might make annual requests to the Secretary for funds to continue operations. (Fey, McNickle. 1970:119)

Bureau of Indian Affairs staff and some members of Congress angry with then B.I.A. Commissioner John Collier vigorously lobbied to subvert the intent of the original bill. They succeeded. In the end, only the provisions relating to "Indian preference" were retained and an opportunity for full Indian self-government was lost. Although tentative steps were later taken to decentralize the B.I.A., (Fey, McNickle. 1970:120) the wheels of bureaucracy worked to prevent an "administrative shift of power" from the B.I.A. to each Indian Tribe. Repeated proposals for reductions in B.I.A. power linked with enhanced Indian self-government have been offered in succeeding years. Each such attempt has been overcome by objections from the "entrenched bureaucracy."

In the last months of his Administration, President Lyndon B. Johnson announced his rejection of the policy of termination and urged that it be replaced by a policy of fostering self- determination. Two years later, President Richard M. Nixon on July 8, 1970 announced in his message to Congress the first comprehensive Executive Branch policy on Indian Affairs in modern history. He asserted that his Administration rejected tribal dissolution and termination of the trusteeship, and instead advanced self-determination as the best approach to Indian Affairs.

The U.S. Congress enacted the **Indian Self–Determination and Education Assistance Act** in 1975. The intent of this legislation was to shift Indian development and administrative decision-making from the Bureau of Indian Affairs to Indian governments. An intended outcome of this Act was increased tribal self-government and systematic reductions in the staff and powers of the Bureau of Indian Affairs. The B.I.A. swiftly moved to adopt regulations which substantially subverted the intent of the legislation.

The Congressionally established **American Indian Policy Review Commission** conducted a two year study beginning in 1975 which was critical of past U.S. Indian Affairs policies and the Bureau of Indian Affairs, in particular. The Commission's 1977 report concluded that an Independent Indian Agency should replace the Bureau of Indian Affairs and the Congress should directly provide funding assistance to Indian governments. B.I.A. officials swung into action once again to undercut these important proposals. They promoted widespread fear and opposition. B.I.A. staff made calls to tribal leaders urging their opposition "because the American Indian Policy Review Commission is trying to terminate Bureau services to Indian tribes!"

In 1983, President Ronald Reagan announced his **American Indian Policy Statement** which recalled former President Nixon's announced policy of **Indian Self–Determination.** President Reagan's policy not only reaffirmed the policy of Indian self-determination and rejection of the policy of termination, it affirmed a government to government relationship between the United States and Indian nations. This was a significant advancement in U.S. Indian Affairs policy. Not since before 1871 when the Congress halted treaty negotiations between the United States and Indian tribes had government to government relations been the formal policy of the U.S. government.

The **Presidential Commission on Reservation Economies** in 1984 completed its study resulting in conclusions pertinent to the B.I.A. They were similar to those reached by the Congress' American Indian Policy Review Commission seven years earlier. The Commission urged that U.S. government services should be designed to "focus on trust responsibility from the perspective of protection, rather than management." Furthermore, the Commission recommended that the Bureau of Indian Affairs be replaced with a new agency. "A federal agency which provides financial support and trust protection services would reduce the federal presence in Indian Affairs," the Commission said in its final report. Finally, the Commission suggested that a new agency "would result in the transfer of most appropriated funds directly to tribes and Native groups, and would provide a protective umbrella for tribal government, by making accountability possible through local autonomy."

From the enactment of the Indian Reorganization Act in 1934 through President Richard Nixon's announced Indian Self- Determination policy in 1970, Congress' enactment of the Indian Self-Determination and Education Assistance Act in 1975 and President Ronald Reagan's announced government to government relations policy of 1983, the U.S. government slowly moved toward the reinstatement of formal government to government relations with Indian nations.

After forty-six years, the Executive Branch and the Congress arrived at the same conclusions — on paper. Both branches agree in principle to the policy of self-determination for Indian nations. Both branches agree in principle to the policy of rejecting termination of the trusteeship. Both branches agree in principle to the policy of government to government relations between Indian nations and the United States. Both branches agree in principle to the policy of tribal self-government — tribal local autonomy. The Self-Governance Demonstration Project is a concrete recognition of these agreements. However, time and experience will test once again whether Executive and Congressional policy will be able to subordinate bureaucratic self-interest.

Tribal Policies: Treaties, Rights & Mutual Cooperation

Since the B.I.A. became the operative agency exercising governmental rule over Indian peoples, Indian Tribes have engaged in a long battle to win back control over their own authority to govern themselves. Felix Cohen observed in the **Handbook of Federal Indian Law**, "Self-government is the Indians' only alternative to rule by a government department." (Cohen 1942:122) He noted that self-government:

> includes the power of an Indian tribe to adopt and operate under a form of government of the Indian's choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice. (Cohen 1942:122)

All of these are the attributes of political sovereignty — of political autonomy. These are among the inherent powers that Indian tribes seek to reassume.

While the U.S. moved to assume greater powers over Indians and their territories, Indian leaders did not sit idly accepting every encroachment. Wary of the possibility that the United States could withdraw its meager support, but alarmed at the disastrous affects of U.S. encroachments, many Indian leaders attempted to push back the onslaught. From 1948 through 1957, Indian leaders meeting in the National Congress of American Indians adopted many resolutions conveying their concerns to the United States government. In 1957, Indian leaders' efforts culminated in a proposal for U.S. Congressional legislation called Concurrent Resolution No. 3. Though never adopted, this resolution became the most comprehensive statement of Indian government policy opposing termination and advocating Indian self-government and economic reconstruction of Indian Country.

N.C.A.I. President Joseph Garry, the renowned Chairman of the Coeur d'Alene Tribe, endorsed Concurrent Resolution 3 in his Congressional testimony noting that efforts to terminate Indian nations "kept the Indians so busy defending themselves they had no time or even energy for constructive planning or actions." Concurrent Resolution 3 provided an important forum where Indian leaders began to formulate an Indian agenda for Indian Affairs.

By 1959, the Indian agenda for Indian Affairs began to take shape when the National Congress of American Indians adopted a **Statement of National Policy**. In a more comprehensive statement of the Indian agenda, 470 Indian leaders from 90 tribes met in the American Indian Chicago Conference and developed the **Declaration of Indian Purpose** and adopted it on June 20, 1961. This Declaration says in sum:

> We believe in the inherent right of all people to retain spiritual and cultural values, and that the free exercise of these values is necessary to the normal development of any people. Indians exercised this inherent right to live their own lives for thousands of years before the white man came and took their lands. It is a more complex world in which Indians live today, but the Indian people who first settled the New World and built the great civilizations which only now are being dug out of the past, long ago demonstrated that they could master complexity.

Another great leader, Chairman Earl Old Person of the Blackfeet Tribe, was president of the National Congress of American Indians in 1966. He saw that despite Indian efforts to persuade the United States to change its attitudes toward Indian tribes, the patterns of the past continued:

> Again, I say, "let's forget termination and try a policy that has never been tried before - development of the Indian reservations for Indians and development of Indians as human beings with a personality and a soul and dreams for a bright future." Why is it so important that Indians be brought into the "mainstream of American life?" What is the "mainstream of American life?" I would not know how to interpret the phrase to my people in our language. The closest I would be able to come to "mainstream" would be to say, in Indian, "a big wide river." Am I then going to tell my people that they will be "thrown into the Big, Wide River of the United States?"

Just as President Joe Garry before him called for a new Indian Affairs agenda "setting aside the idea that Indian Nations should be terminated," President Earl Old Person called for Indian tribes and the United States to focus on "rebuilding Indian Country." Both N.C.A.I. Presidents called upon the United States to recognize the inherent intelligence of Indian people and "their ability to decide for themselves what future they shall have." This is the essence of self-determination.

Despite these calls for self-determination, the Bureau of Indian Affairs continued its practices of dominance and intrusion into the affairs of Indian tribes. By the early 1970's U.S. policy toward Indian tribes favored self-determination. Despite eventual agreement with tribal leaders' calls by U.S. Presidents and the U.S. Congress, the B.I.A. persisted in its moves to erode tribal governmental powers. Still Indian self-determination had become U.S. policy.

The practical effect of these policies was, however, to "hand the responsibility of providing services and assistance to Indians over to tribal governments, but holding back the authority to decide with flexibility how to meet the needs of Indian communities." Indian Nations were achieving self- determination in name only. Meanwhile, the Bureau of Indian Affairs continued its quest for more power over Indian tribes.

When the American Indian Policy Review Commission completed its two-year study in 1977, it became clear that while the principle of Indian self-governance and the promotion of Indian self-sufficiency functioned as "buzz words" in the U.S. bureaucracy, the practical application of Indian self-government was far from being achieved.

After Joe DeLaCruz, President of the Quinault Indian Nation became President of the National Congress of American Indians, he joined his predecessors in pressing for the Indian Agenda. President DeLaCruz proposed in 1983: "that we make a decisive departure from the recurring issues that divert our attention from the most important priorities and initiatives necessary to establish meaningful government-to-government relations with the United States." He proposed that Indian tribes take "the next logical step beyond the Indian Self-Determination Act" with the enactment of a **Tribal Grant-In-Aid-Act**. He urged that such an Act:

> would authorize five year financial agreements between Indian Nations and the United States, negotiated to cover Tribal government operations, economic development, housing, health and human services, and other Tribally-determined needs. The Grant- in-Aid would require a line item appropriation from Congress for each Indian government concluding an agreement with the United States and funds would be disbursed through the Department of the Treasury. The Act would include a transition clause allowing Tribal governments a supportive bridge from PL 93-638 contracting to grant-in-aid management. Each agreement, of course, would provide that the trust relationship and obligations of the United States will be upheld . . . .

President DeLaCruz's proposal for a Grant-in-Aid approach to achieving self-determination closely resembles the emerging shape of the tribal self-governance process. Indeed, his proposal and the proposals of his predecessors became the foundation of the Tribal Self-Governance Demonstration Project.

The Convergence of Tribal and U.S. Policy

Increasingly tribal leaders agree that the outcome of a self-determination policy ought to be self-sufficiency in the conduct of tribal social, economic and political affairs. To Indians, self-sufficiency means the perpetual social, economic and political existence of Indian nations - exercising the full powers of self-governance. To others, however, self-sufficiency means the elevation of social and economic standards on Indian Reservations equal to neighboring, non-Indian communities; and, the ultimate elimination of Indian nations through assimilation. Decidedly, it is the former not the latter definition that Indian tribes advocate and seek to achieve.

In the Fall of 1987, the then Assistant Secretary of Indian Affairs Ross Swimmer initiated a Bureau of Indian Affairs proposal to the House Appropriations Sub-Committee calling for "a demonstration project to transfer B.I.A. resources at all levels" to Indian Tribes seeking such a transfer. In part, one aspect of Swimmer's proposal came directly from the recommendations of the Presidential Commission on Reservation Economies. By inference, his proposal also came from the Report of the American Indian Policy Review Commission and the Indian Affairs Policy statements of former Presidents Nixon and Reagan. Mr. Swimmer's proposal, however, also contained a provision absolving the U.S. of its Trusteeship obligations to those tribes accepting the transfer.

Congressman Sidney Yates (D-Ill.) (a former member of the American Indian Policy Review Commission) Chairman of the House Interior and Related Agencies Appropriations Sub-Committee, asked Quinault President DeLaCruz and Lummi Tribal Chairman Kinley to meet with him to discuss the Bureau of Indian Affairs proposal. The tribal leaders viewed Swimmer's proposal for direct tribal funding with skepticism because of the lack of process, and even more importantly because of the proposed abrogation of trust responsibility. The underlying proposal, absent the termination of the federal trust responsibility, was viewed as having some merit. The product of those discussions was a tribal proposal for the establishment of a "Tribal Self-Governance Demonstration Project" which maintains the U.S. government's trust responsibilities. Congressman Yates' Sub-Committee accepted the proposed alternative and included it in the Appropriations Act of December 22, 1987. (see Appendix A) The first joint movement toward U.S. and Tribal implementation of self-determination and tribal Self-Governance had begun. Importantly, it had begun as a result of discussions and negotiations between Indian leaders and the Congress with the participation of the Executive Branch. In a concrete sense, the tribal plan for a Self-Governance Demonstration Project represented the agreement in principle between tribal officials and officials of the U.S. Executive and Legislative branches.

Five months after the Congress appropriated funds for the Self-Governance Demonstration Project, ten Indian nations which volunteered to participate became the first to undertake the self-governance planning process. By September 1988, the Congress of the United States enacted substantial amendments to the Indian Self-Determination and Education Assistance Act (PL 100-472); and included in that Act was a special Title (See Appendix B) which authorized the Tribal Self-Governance Demonstration Project for five years. Under the dual Acts of 1987 and 1988, Indian Nations and the U.S. Congress formalized a process which allows for Indian Nations to undertake up to two-years of self-governance planning, conduct negotiations with the United States for annual funding agreements and carry-out the three-year Tribal Self-Governance Demonstration Project after successful negotiations.

In accord with understandings with Congressional Committees and directives to the Bureau of Indian Affairs, each of the initial self-governance tribes will determine in 1989 whether to enter into self-governance negotiations with the United States. Where negotiations are reached, a delegation of U.S. representatives will negotiate a Self-Governance Compact with each Indian government delegation. After successful negotiation of a Compact, each Indian nation will undertake a three-year Self-Governance Demonstration Project.

The mechanisms have now been set up between the United States and Indian nations to permit Indian tribes to take "the next logical step beyond the Indian Self-Determination Act." Not since before 1871, has there been a greater opportunity for Indian nations to reassume the powers of self-government, and for the United States to turn its policies of self-determination and government-to-government relations into a practical reality.

The Tribal Self-Governance process involves discussions and negotiations about the process of government-to-government relations between Indian governments and the United States. It includes the need to discuss in detail and without bias, the nature of tribal governmental powers of legal and political jurisdiction and the future relations between tribal governments and the citizens and residents living inside reservation boundaries. The Indian Affairs Agenda means consideration of future relations between self-governing Indian tribes and neighboring counties and states. It means fundamentally restructuring the political shape of Indian Affairs. What will be the political status of self-governing Indian nations in relation to the U.S. Federal System? What will the economies of self-governing Indian nations look like? How will they be defined and organized? The outcome of Self-Governance Compact negotiations will determine the future shape of Indian Affairs.

U.S. & Tribal Self-Governance Legislation

The Appropriations Act of December 22, 1987 (Conference Report 100-498, H.J. Res. 395) included three paragraphs which may well change the very nature of Indian Affairs and future relations between Indian Nations and the United States. While the Act provided $1 million dollars for self-determination planning grants to support the self-governance demonstration project, it did much more. It directed "the Bureau of Indian Affairs formulate a proposal for the equitable distribution of resources, and service responsibilities between" demonstration tribal governments and neighboring tribes served by the same agencies or Area

Offices of the Bureau of Indian Affairs. The Act specifically provided that negotiations of funding transfer agreements between demonstration tribes and the United States "include a clear delineation of trust responsibility protections assumed by the tribes and retained by the United States government."

Ten initial Self-Governance participating tribes were appropriated initial funds in the amount of $1,000,000 to begin Self-Governance Planning. By mutual agreement, planning activities would include the areas of legal and budgetary research, internal tribal government planning and organizational preparation, and the negotiation process in fiscal year 1988. This action was later supplemented by the Congress appropriating an additional $1.2 million for self-governance planning in fiscal year 1989. The Congress directed the Bureau of Indian Affairs to analyze all budgets and functions at all levels of the Bureau, and to formulate a proposal for the equitable distribution of resources and service responsibilities that may serve as the U.S. government's position in negotiations with self-governance tribes. The Bureau of Indian Affairs was also instructed to prepare proposals for reduction or transfer of personnel and consolidation of program functions to accommodate the eventual transition. Each Self-Governance participating tribe was to document obstacles and proposed remedies identified with the Self-Governance Planning Process.

The Congress further provided that negotiated agreements between Self-Governance participating tribes and the United States should include a clear delineation of trust responsibility protections assumed by the tribes and those retained by the United States government. These agreements must also include a method for documenting self-governance progress through mutually-determined baseline measures which are incorporated in each agreement.

Following Congressional approval of appropriations for the self-governance project, each of the ten volunteering tribes adopted their own legislation formally approving their own participation in the project. The tribal legislation formally requested and accepted a $100,000 planning grant. Each tribe's legislation and planning approach accepted Congressional guidelines, but took the shape specific to each tribe.

After the Congress appropriated funds and each tribe enacted its own legislation, supplemental and clarifying legislation was developed to authorize the self-governance project for a five- year period. This latter legislative initiative took the form of Title III of the 1988 Amendments to the Self-Determination and Education Assistance Act (PL 100-472). Title III set out a process and criteria for adding new participating tribes to the original list of ten on the basis of geographic representation. In addition, the Secretary of the Interior was directed to negotiate annual funding agreements (Self-Governance Compacts) with each tribe which successfully completed the self-governance planning process. The Secretary of the Interior was instructed to interpret existing U.S. laws and regulations to expedite and facilitate self-governance agreements.

The significance of these U.S. and tribal enactments is that Tribal leaders and members of Congress negotiated and settled on the terms of each enactment. The combined effect of U.S. and tribal legislation is to re-open a formal process of government to government negotiations between Indian nations and the United States.

Obstacles to Self-Governance

Early in the conceptual stage of the self-governance demonstration initiative, tribal and Congressional representatives recognized the potential for obstacles to the process. Representatives anticipated that participating self-governance demonstration tribes would experience both internal and external obstacles. The self-governance demonstration initiative not only uncovered numerous institutional obstacles, it also provoked significant political and bureaucratic obstructionism.

Externally, self-governance demonstration tribes found significant obstacles and obstructionism. Individuals and organizations whose self-interest lay with the existing system formed a small, but vocal, minority working to subvert the self- governance process. These individuals, both inside and outside the U.S. government, raise the spurious specter of self-governing tribes beset by graft, waste and frivolous expenditures of revenues if the tribes control their own economic, social and political destiny. This group has attempted to frighten tribal staff members into believing their jobs are in jeopardy.

Despite Congress' directives, the B.I.A. has been reluctant to supply information requested by the initial self-governance tribes. Instead of open cooperation, the B.I.A. has maneuvered to retard self-governance planning progress. No appropriations were sought by the B.I.A. in either FY 89 or FY 90 to implement self-governance. The B.I.A.'s reluctance to cooperate has become a frequent and deliberate obstacle to progress.

Internally, self-governance tribes have uncovered institutional obstacles contained in their constitutions, especially those tribal constitutions established under the Indian Reorganization Act of 1934. Accounting and administrative systems imposed on tribes by the Bureau of Indian Affairs, or resulting from years of B.I.A. influence, have also proved to be obstacles. Instead of being designed to respond to community needs, elements of these systems are designed to respond to the Bureau of Indian Affairs' needs. A consequence of these conditions has been the realization that some self-governance tribes lack a fully working infrastructure responsible to tribal needs. Self-governance requires an infrastructure suited to the specific needs of each individual tribe.

Participating tribes remain stead-fast because they know that the future of Indian tribes in the United States depends on tribes becoming self-sufficient and self-governing societies. Participating tribes seek to overcome obstacles and obstructionism by clearly demonstrating the inherent intelligence of Indian people and "their ability to decide for themselves what future they shall have."

Self-Government and Changes in the B.I.A.

Two commissions, the American Indian Policy Review Commission of the U.S. Congress (1975 - 1977) and the Presidential Commission on Reservation Economies (1984) found that the Bureau of Indian Affairs and many past policies of the United States government stifle tribal efforts to achieve social, economic and political self-sufficiency. Both commissions also found that the Bureau of Indian Affairs should be restructured to focus on the "protection of Indian tribes" instead of "managing the affairs of Indian tribes." Both commissions found that the Bureau of Indian Affairs uses a disproportionate amount of Congressionally appropriated funds to support its own operations instead of providing adequate assistance and support to Indian tribes. Finally, both commissions found that transferring funds and functions from Bureau of Indian Affairs directly to Indian governments and correspondingly reducing the size of the B.I.A. bureaucracy would increase local tribal accountability through local autonomy and stream-line the Bureau of Indian Affairs into an agency which protects instead of manages Indian tribes.

The Tribal Self-Governance Demonstration Project was initiated to accomplish a reduced direct Federal involvement in the management of Indian tribes. It is also designed to resolve problems associated with multi-tribe B.I.A. Agencies, reduce the size of the B.I.A. bureaucracy, allow more direct local decision- making by tribal governments, and a stabilize the level of B.I.A. appropriated funding. The federal burden for administering many social and economic programs to self-governing tribes would decline over a period of years as functions and resources are transferred through negotiations of a Self-Governance Compact. Correspondingly, the structure of the Bureau of Indian Affairs and its personnel burden should reduce with the conclusion of each Self-Governance Compact. This approach has the advantage of increasing local decision-making at the tribal level, reducing federal Indian Affairs management functions with a corresponding emphasis on trust protection responsibilities. The systematic transfer of resources and responsibilities from the B.I.A. to tribal governments is the next logical step toward achieving true Indian self-determination.

APPENDIX A

Conference Report 100-498 accompanying H.J. Res. 395
One Hundredth Congress, First Session
December 22, 1987

$4,000,000 has been restored for self-determination grants. Of this amount, $1,000,000 is to be used by the Bureau for a tribal self-governance demonstration project. The project will allow up to ten tribal governments, which were named in the Department's letter to the Appropriations Committee dated December 15, 1987, the opportunity to design their own budgets to address tribally determined priorities. The managers direct the Bureau to analyze all budgets and functions at all levels of the Bureau, and to formulate a proposal for the equitable distribution of resources and service responsibilities between these demonstration tribal governments and the remaining tribal governments in multi-tribal agency and area offices. The Bureau should also prepare proposals for reduction or transfer of personnel and consolidation of program functions to accommodate the eventual transition. The $1,000,000 shall be provided under the contracting and granting authority of P.L. 93-638, as a planning grant, to the ten tribes for legal and budgetary research, internal tribal government planning and organizational preparation, and the negotiation process. Each of the tribes shall document obstacles and proposed remedies identified with this planning process, to be consolidated into a comprehensive report to be submitted to the Appropriations Committees by September 1, 1988. As fiscal year 1988 will be the planning phase for the self-governance demonstration project, normal P.L. 93-638 programs and budgeting should be separate from the planning process. The negotiated agreements should also include a clear delineation of trust responsibility protections assumed by the tribes and retained by the United States government. To document tribal progress under self-governance, mutually-determined baseline measures are to be incorporated into each demonstration agreement between the Federal government and the tribes.

Progress reports on this project shall be submitted by the Bureau by April 1, 1988, and September 1, 1988, documenting any problems experienced in the planning phase and proposed solutions. The managers expect the Bureau to work closely with the tribes involved in the demonstration project to ensure the success of this initiative, and will closely monitor its progress over the coming year.

The balance of $3,000,000 for self-determination grants is to be added to the Indian Services-Tribe/agency budget, to be distributed according to tribal priority, for self-determination grants or other high priority activities within this program. A report on the changes that result should be submitted to the Committees as soon as possible.

APPENDIX B

TITLE III -- Tribal Self-Governance Demonstration Project
Contained in Public Law 100-472
September 15, 1988

Section 301. The Secretary of the Interior shall, for a period not to exceed five years following enactment of this title, conduct a research and demonstration project to be known as the Tribal Self-Governance Project according to the provisions of this title.

Section 302. *(a)* The Secretary shall select twenty tribes to participate in the demonstration project, as follows:

(1) a tribe that successfully completes a Self-Governance Planning Grant, authorized by Conference Report 100-498 to accompany H.J. Res. 395, One Hundredth Congress, first session shall be selected to participate in the demonstration project; and

(2) the Secretary shall select, in such a manner as to achieve geographic representation, the remaining tribal participants from the pool of qualified applicants. In order to be in the pool of qualified applicants—

(A) The governing body of the tribe shall request participation in the demonstration project;

(B) such tribe shall have operated two or more mature contracts; and

(C) such tribe shall have demonstrated for the previous three fiscal years, financial stability and financial management capability as evidenced by such tribe having no significant and material audit exceptions in the required annual audit of such tribe's self-determination contracts.

Section 303. *(a)* The Secretary is directed to negotiate, and to enter into, an annual written funding agreement with the governing body of a participating tribal government which—

(1) shall authorize the tribe to plan, conduct, consolidate, and administer programs, services and functions authorized under the Act of April 16, 1934 (48 Stat. 596), as amended, and the Act of November 2, 1921 (42 Stat. 208);

(2) subject to the terms of the written agreement authorized by this title, shall authorize the tribe to redesign programs, activities, functions or services and to reallocate funds for such programs, activities, functions or services;

(3) shall not include funds provided pursuant to the Tribally Controlled Community College Assistance Act (Public Law 95-471), for elementary and secondary schools under the Indian School Equalization Formula pursuant to title XI of the Education Amendments of 1978 (Public Law 95-561, as amended), or for either the Flathead Agency Irrigation Division or the Flathead Agency Power Division; Provided, That nothing in this section shall affect the contractability of such divisions under section 102 of this Act;

(4) shall specify the services to be provided, the functions to be performed, and the responsibilities of the tribe and the Secretary pursuant to this agreement;

(5) shall specify the authority of the tribe and the Secretary, and the procedures to be used, to reallocate funds or modify budget allocations within any project year;

(6) shall except as provided in paragraphs (1) and (2), provide for payment by the Secretary to the tribe of funds from one or more programs, services, functions, or activities in an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act, including direct program costs and indirect costs, and for funds which are specifically related to the provision by the Secretary of services, and benefits to the tribe and its members; Provided, however, That funds for trust services to individual Indians are available under this written agreement only to the extent that the same services which would have been provided by the Secretary are provided to individual Indians by the tribe;

(7) shall not allow the Secretary to waive, modify or diminish in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians which exists under treaties, Executive orders,

and Acts of Congress;

(8) shall allow for retrocession of programs or portions thereof pursuant to section 105(e) of this Act; and

(9) shall be submitted by the Secretary ninety days in advance of the proposed effective date of the agreement of each tribe which is served by the agency which is serving the tribe which is a party to the funding agreement and to the Congress for review by the Select Committee on Indian Affairs of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives.

(b) For the year for which, and to the extent to which, funding is provided to a tribe pursuant to this title, such tribe—

(1) shall not be entitled to contract with the Secretary for such funds under section 102, except that such tribe shall be eligible for new programs on the same basis as other tribes; and

(2) shall be responsible for the administration of programs, services and activities pursuant to agreements under this title.

(c) At the request of the governing body of the tribe and under the terms of an agreement pursuant to subsection (a), the Secretary shall provide funding to such tribe to implement the agreement.

(d) For the purpose of section 110 of this Act the term *contract* shall also include agreements authorized by this title.

(e) To the extent feasible, the Secretary shall interpret Federal laws and regulations in a manner that will facilitate the agreements authorized by this title.

Section 304. The Secretary shall identify, in the President's annual budget request to the Congress, any funds proposed to be included in the Tribal Self- Governance Project. The use of funds pursuant to this title shall be subject to specific directives or limitations as may be included in applicable appropriations Acts.

Section 305. The Secretary shall submit to the Congress a written report on July 1 and January 1 of each of the five years following the date of enactment of this title on the relative costs and benefits of the Tribal Self-Governance Project. Such report shall be based on mutually determined baseline measurements jointly developed by the Secretary and participating tribes, and shall separately include the views of the tribes.

Section 306. Nothing in this title shall be construed to limit or reduce in any way the services, contracts or funds that any other Indian tribe or tribal organization is eligible to receive under section 102 or any other applicable Federal law and the provisions of section 110 of this Act shall be available to any tribe or Indian organization which alleges that a funding agreement is in violation of this section.

* * * *

SECTION 210. SAVINGS PROVISIONS.

Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to Indian people.

SECTION 211. SEVERABILITY.

If any provision of this Act or the application thereof to any Indian tribe, entity, person or circumstance is held invalid, neither the remainder of this Act, nor the application of any provisions herein to other Indian tribes, entities, persons, or circumstances, shall be affected thereby.

References

American Indian Policy Review Commission: Final Report, U.S. Congress. Government Printing Office. (May 17, 1977)

Report and Recommendations to the President of the United States, Presidential Commission on Indian Reservation Economies, The White House. (November 30, 1984)

Fey, Harold E. and McNickle, D'Arcy. **Indians and Other Americans: Two Ways of Life Meet**, New and revised edition. Harper & Row, New York. (1970)

Cohen, Felix S., **Handbook of Federal Indian Law**, U.S. Government Printing Office (1942), University of New Mexico Press (1974), Five Rings Corporation (1986).

Termination, President Lyndon B. Johnson, The White House. (March 6, 1968)

Indian Self–Determination, President Richard M. Nixon, The White House. (July 8, 1970).

Indian Policy Statement, President Ronald Reagan, The White House. (January 14, 1983).

N.C.A.I., Various published and unpublished papers from the Archives of the National Congress of American Indians. (1944 - 1984).

DeLaCruz, Joseph B., Various published and unpublished papers of Quinault President Joe DeLaCruz. (1975 - 1988).

LUMMI INDIAN BUSINESS COUNCIL
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DEPARTMENT: ____________ EXT. ______

STATEMENT OF THE
LUMMI INDIAN BUSINESS COUNCIL
TO THE
SENATE SELECT COMMITTEE
ON
INDIAN AFFAIRS

June 9, 1989

OVERSIGHT HEARING ON INDIAN SELF-DETERMINATION

SHAPING OUR OWN FUTURE: THE PROMISE OF INDIAN SELF-GOVERNANCE

The Tribal Self-Governance Demonstration Project, enacted by Congress with the passage of Public Law 100-472, Title III, represents a major step in restoring the basic right of self-determination and self-governance to Indian Nations.

Centuries before Europeans settled in North America, Indian Nations had established proud civilizations, self-sufficient economies and rich cultural heritages. During the past century, however, the natural creativity of Indian people and the inherent dignity of Indian Nations have been smothered by an ineffective, unresponsive U.S. government bureaucracy which continues to exhibit difficulties in recognizing needs, priorities, goals and sovereignty of our Indian Nations.

Agencies of the U.S. Government, particularly the Bureau of Indian Affairs, have assumed near-absolute power to govern Indian Tribes. Even the most basic aspects of Indian life, such as law enforcement, economic development and social services, are largely controlled by BIA personnel who have minimal understanding of unique tribal cultures and social infrastructures in these areas with respect to a specific Tribal community.

Indian Nations which never agreed to this type of domination, are now aggressively seeking a change. The Lummi Nation seeks to regain our right of self-governance -- the power to live under a form of government of our own choosing; define conditions of our own governmental structure; manage our own tribal activities through our own laws and regulations; and, to maintain our own justice systems. We choose to determine our own destinies.

The goal of the Lummi Self-Governance Demonstration Project is to provide the Lummi Nation with the opportunity to exercise greater

LARRY G. KINLEY
Chairman

RANDY KINLEY   SAMUEL M. CAGEY   RICHARD P. JEFFERSON   RONALD A. FINKBONNER   GERALD JAMES

control over our future. The Lummi project is intended to:

- Formalize relations between the United States and the Lummi Nation on a government-to-government basis;
- Allow the Lummi Tribal government to determine our own priorities, and to redesign programs and reallocate resources to better meet the needs of our Tribal members;
- Promote greater social, economic, and political self-sufficiency for the Lummi Nation and its peoples;
- Improve tribal accountability through local autonomy and;
- Reduce the size and administrative burdens of the Bureau of Indian Affairs by shifting the agency's role from the day-to-day management of tribal affairs to that of protection of tribal interests.

The Tribes who chose to initially participate in the Self-Governance Demonstration project are now entering into the second year of Phase I of planning and research. It is expected that Phase I will be nearing completion by the end of the 1989 calendar year. The Lummi Nation anticipates completing Phase II, the Negotiation Process in early 1990. The Phase III Implementation Stage will be initiated upon the successful completion of the Phase II negotiation stage. Everything depends, of course on a successful negotiation.

PHASE I - PLANNING & RESEARCH

INTERNAL

The Lummi Indian Nation has formulated a comprehensive internal planning process which centers on the Tribal government, and community participation in the examination of budgetary, legal, organizational and procedural factors affecting the future self-governance of the Lummi Nation.

CONSTITUTION REVISION

At the present time the the Lummi Nation is governed by a Constitution that was first adopted in 1948 and revised in 1970. Although the Lummi Tribe did not elect to organize under the Indian Reorganization Act of 1934 (Wheeler-Howard Act), BIA assistance was sought in the drafting of the 1948 and the 1970 Tribal Constitutions. The BIA recommendations proposed that the Lummi Tribe adopt an IRA style of Constitution. The end result is a Constitution that allows for the approval of Tribal actions by the "Commissioner of Indian Affairs." This provision restricts Tribal powers and allocates authority and control of Tribal governmental matters to the BIA.

The Lummi Indian Business Council is in the process of revising its present Constitution in order to: maximize the Tribes ability to perform governmental functions, to better address the needs of the Tribal Community and, to improve its relationship with the United States on a government-to-government basis. The revision process is intended to eliminate the control that the BIA now exercises over Tribal governmental affairs. A Lummi Tribal Constitution that promotes true self-determination and sovereignty, rather than inhibits it, is our ultimate goal.

Based upon the revision of the Tribal Constitution, further legal research will be necessary to comprehensively implement the inherent powers of the Lummi Nation. We plan to review and revise By-Laws, Codes, Statutes, and Ordinances as necessary. Extended legal research will be required to allow the Lummi Tribal government to effectively and efficiently administer its governmental services to the members of the Tribal community.

INTERNAL REORGANIZATION

Presently, the Lummi Tribal Governmental structure has been organized to administer federal grants and contracts under federal rules, regulations, and guidance. The Tribal organization, under it's present structure, may not be suitable for the internal appropriation allocation process that will be necessary to implement the Tribal Self-Governance Demonstration Project.

It will be necessary to re-evaluate existing operations and establish new tribal policies which will guide the resource acquisition, allocation, utilization, and impact evaluations. Through the revision of the Lummi Constitution, the Tribal Council's role will be more clearly defined. Program performance standards are being developed to measure program progress and cost control on a longitudinal basis to establish an effective resource management process, the current budget structure is being revised including the development of appropriate financial policies and procedures.

A tribal government organized to address the needs of the people will be able to productively manage the expanded activities and opportunities presented by the initiation and successful implementation of the Lummi Self-Governance Demonstration Project. The reorganized structure will comprehensively meet the multi-layered and complex needs of the Tribe.

UNDERSTANDING THE NEEDS OF THE LUMMI TRIBAL COMMUNITY

As noted above, the Lummi government currently responds to and reacts to the restrictive regulations and conditions that accompany each grant and contract under Tribal management. Programs designed to follow these rules and regulations have created fractionated programs that respond selectively to their target populations and government reporting requirements. Current BIA programs have become generic for all Tribes across the Nation, and have not been designed for the unique needs of our Tribe. There has not been consideration of the fact that each Tribe is very different, with it's own culture, values, customs traditions and NEEDS. It is for these reasons that a comprehensive needs assessment is necessary. Upon completion, the Lummi Tribal government will be able to more clearly comprehend the true needs of its people; develop the appropriate programs and services; and, determine the resources necessary for the implementation of those programs, services, and functions.

The comprehensive needs assessment will be completed with the assistance of a tribal advisory board. Lummi Tribal members have been employed and trained in the random sampling processes. They will receive three (3) other training sessions which will cover interviewing techniques, and content analysis. Two hundred (200) individual interviews will be conducted based upon the population sampling, twelve (12) meetings will be conducted in various selected geographic locations and twenty-five (25) interviews will be conducted of current Lummi Indian Business Council (LIBC) staff and current members of the LIBC.

The content analysis and a summary of the assessment will be completed and submitted to the LIBC September 30, 1989. Based upon these results, programs, services, functions and resources can be prioritized to more adequately meet the needs of the people of the Lummi Community by the LIBC.

INTERNAL OBSTACLES AND PROPOSED REMEDIES

The Conference Report Language of the House Interior and Related Agencies Appropriations Sub-Committee, (December 22, 1987) requires tribes to document obstacles encountered in the planning and research Phase and propose remedies to those obstacles. A report on the "Obstacles Experienced and Their Proposed Remedies, During the Period December 22, 1987 through August 15, 1988," was submitted to the House, Committee on Appropriations, Interior and Related Agencies Appropriations Sub-Committee on September 1, 1988. Since that time, other obstacles have been encountered that have inhibited the planning, research and organizational activities, and obstructed the LIBC ability to make decisions and/or our ability to achieve our self-governance goals.

The Lummi Nation in concurrence with the other Self-Governance Demonstration Project Tribes defines an obstacle as, "Any intentional or unintentional action by an individual, group, organization, institution or government internal or external to an Indian Nation which tends to hinder or obstruct Indian government Self-Governance planning, negotiations or implementation."

INTERNAL OBSTACLES

Since September, 1988, the following internal obstacles have been encountered:

(1) The Lummi Self-Governance Demonstration Project has experienced delays due to the second year BIA grant award process. The Lummi Indian Business Council submitted an extension request to the Department of the Interior on February 17, 1989. LIBC received a notice dated April 27, 1989 from the Acting Assistant Secretary of Indian Affairs, W. M. Ragsdale. This letter states, "I have decided to accept your proposal for a second year planning grant. Accordingly, I have instructed your Area Director to begin the negotiation and award process as soon as possible." A tribal letter was sent to the BIA Puget Sound Agency Office at their request for an extension of the first year planning grant for an additional $100,000.00 on May 16, 1989. As of this date, we have been only informally notified that our extension request has been granted. We still have not received formal notification of the second year grant award, three and one half (3 1/2) months after LIBC sent our grant proposal to the Department of Interior. As a result of this delay LIBC has been hesitant to move forward at a pace needed to complete the necessary planning and research of Phase I.

(2) LIBC determined it necessary to enter into a special Attorney Contract to provide the legal services necessary to carry out the goals and objectives as outlined in the Lummi Self-Governance Demonstration Project. The BIA upon receipt of the Lummi Attorney Contract, notified the tribe that there were six (6) stipulations that needed to be clarified before acceptance and processing of the Special Contract. Again, BIA interference has stifled the progress of the planning and research phase of the Lummi Self-Governance Demonstration Project.

(3) Internal budget research progress has been hampered due to the fact that LIBC staff have had to devote much of their time addressing the Indian Priority System (IPS) of budget formulation used by the BIA. It has been proven in the past that the IPS budget system for the Multi-Tribe agency as created and implemented by the BIA is a meaningless endeavor of the LIBC.

* The BIA has arbitrarily changed and/or determined tribal budget priorities and/or funding allocations without prior consultation or prior approval of the Tribal government;

* The BIA IPS budget system has proven to be inadequate at the Multi-Tribe Agency in that the budget priorities of individual Tribal governments are to be consolidated. In this process, individual Tribally-determined priorities have not been given credible recognition or attention. The effect of this type of action becomes even more complex when the Agency and Area Offices arbitrarily change and/or ignore Tribally-determined budget priorities. For example, the 12 Tribes of of the Puget Sound Agency submitted the Lummi Tribes budget priorities for FY 1990 only to be changed by Puget Sound Agency Administration. All Tribal priorities were dropped one level and the Agency listed

"Executive Direction" as the number one Tribal Priority.

- The IPS budget system does not provide the means for a Tribal Government that is a part of a Multi-Tribe Agency to exercise true self-determination and true sovereignty independent of other Tribal governments. There is no consistent methodology for the Agency or the Tribal government to determine the equitable distribution of resources among Tribes to enable Tribal governments to independently operate any Agency functions or programs.

(4) Due to the inadequacies and conflicts that have arisen as a partial result of the BIA IPS budget formulation system, some fear has been expressed by the other eleven Tribes of the Puget Sound Agency as to the effects of the Lummi Tribal governments participation in the Self-Governance Demonstration Project. The BIA's response to the Tribes has been that the Self-Governance Demonstration Project is NOT a BIA developed Project but, that the Tribes have initiated and are implementing these actions. This may have the effect of creating a conflict between Self-Governance Demonstration Project Tribes and the other Tribes of a Multi-Tribe Agency.

PROPOSED REMEDIES TO INTERNAL OBSTACLES

(1) Through the successful revision of the Lummi Constitution, BIA interference and control of the internal affairs will be limited to that of protection rather than management. By the elimination of Tribal dependency on the BIA, the Lummi Nation will be able to move forward towards the further development of the Tribal organization. By allowing Tribal governments the opportunity to act in an effective leadership role for the people of the Tribal community, a process of stable and consistent decision-making will be established. The Tribal council authority will be able to effectively and efficiently receive, manage, budget, and disburse resources to programs, services, activities and functions that will meet the true needs of the Lummi Tribal community.

(2) The LIBC realizes that assertion of our Tribal sovereignty towards true self-determination and self-governance requires the Tribal leadership to be visionary and to accept the increased responsibility that the Self-Governance Demonstration Project requires for its successful implementation. Tribal leaders have remained steadfast in their commitment towards the rebuilding of the Lummi Community and the reversal of the years of dependency on the federal government and it's agencies. Regardless of the on-going obstacle posed by the BIA, the LIBC will continue in a systematic process of defining and achieving our short and long term goals.

(3) On January 26, 1989 former President Richard Nixon wrote to the Senators on the Special Committee on Investigations of the

Senate Select Committee on Indian Affairs requesting the establishment of an "Indian Trust Counsel Authority" stating:

> "Our goal in 1970 was to replace Federal programs that were both grossly ineffective and also demeaning to these Americans with policies that would give them more control over their own destinies. As President, I took special pride in supporting the policy of "Self-Determination Without Termination," whereby my Administration endorsed Indian control and responsibility over government service programs."

On March 12, 1989 the Lummi Indian Tribe submitted to the Senate Special Committee on Investigations a statement of concern. In that document we call for the establishment of a "Department of Indian Affairs" for "removing the conflicts between protecting Indian rights of the public domain lands and resources placed under the Department of Interior." In order to reaffirm the government-to-government relationship and to aid in the development of a policy that reflects that relationship, a "Department of Indian Affairs" would provide a coordinated and centralized effort in realization of the Tribes goal of self-government, self-determination and sovereignty.

(4) Continued Congressional oversight will be necessary to ensure that the BIA is unable to subvert the efforts of the Tribes in the Self-Governance Demonstration Project as they have in the past century. A key to the success of the implementation of the Self-Governance Demonstration Project will be the BIA's willingness to work with the Lummi Tribal government.

(5) The Lummi Nation recognizes that how we communicate the importance of the Project and how it will be administered, are important factors for its successful implementation. To develop and formulate positive cooperation with potentially affected Tribes, Communities, Governments and their agencies, a comprehensive Communications Plan has been put into action. The LIBC will continue to participate in the education process of communicating a clear understanding of what true self-governance is all about.

EXTERNAL ACTIVITIES TO ACHIEVE SELF-GOVERNANCE

BUDGET RESEARCH

Tribal governments which decided to enter into the planning phase of the Self-Governance Demonstration Project determined early that on some matters, joint cooperation would be desirable. Toward that end, the Lummi Indian Business Council entered into a cooperative agreement in principle with several governments to establish a Joint Planning process which would focus on "cross-tribal" legal, budgetary, organizational, planning and reporting activities. The joint planning process has been designed to augment and support the internal planning process.

The LIBC continues to meet and work cooperatively with the other initial nine (9) Tribes of the Self-Governance Demonstration Project. Seven (7) of the ten (10) have joined in a cooperative effort in obtaining information regarding the BIA's budget policies and processes and obtaining current budgetary information regarding all services provided by the BIA to the Tribes. Line item tables have been developed to try to show bureau wide amounts of all BIA appropriated funds at the Agency, Area, and Central Office levels for the fiscal years 1984-1989.

Correspondence has been sent to the BIA Central, Area, and Agency offices, since July, 1988, requesting funding allocation information for each of ten (10) initial Self-Governance Demonstration Project Tribes. A written report on the review and analysis of the information received from the BIA regarding funding allocations was to be completed by March 31, 1989. However, due to the lateness of the responses and inadequacies of the information received from the various BIA agencies the report is now scheduled to be completed in mid-Summer, 1989.

LEGAL RESEARCH

The LIBC, in joint cooperation with the Jamestown Klallam Band of Indians and the Quinault Indian Nation have actively participated in the development of positive regulations and guidelines for the Self-Governance Demonstration Project and to develop a model funding agreement to be used in Phase III for negotiations if a Tribal government chooses to enter into that Phase of the Project.

Throughout the various phases of the project, it will be necessary for the LIBC to maintain viable government-to-government relationships with other governments; including tribal, county, state or Federal. It will be necessary to clearly define and refine the U. S. Governments' trust responsibility for the Tribes land base, natural resources and other monetary resources. This in part will be accomplished by the identification and quantification of resources and/or assistance needed to carry out Treaty obligations.

As self-governance will create a new government-to-government relationship between Indian tribes and the United States, the development of both internal and external legal protections are fundamental to the self-governance process. Legal research, analysis, and development addressing all aspects of self-governance will be necessary as we serve the pioneer roles in establishing this new relationship.

NEGOTIATIONS

The negotiation phase between tribal governments and the United States will be the critical test of the self-governance concept. Although Congress and the participating tribes have positive expectations, a most reluctant BIA bureaucracy has an extensive arsenal of administrative tactics to create failure. While the tribes and the BIA can negotiate the broader aspects of a compact, we would encourage the involvement of an appointed White House negotiator with Interior Department policy officials to ensure fairness in the final negotiation stage. Representation from the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs in these final negotiations would assure compliance with Congressional policy.

EXTERNAL OBSTACLES

(1) Due to the funding delays and lack of complete information received from the BIA regarding funding allocations for each participating Tribe, the analysis of the information needed to determine the specific funds for which a Tribe will be eligible to negotiate has been set back three and one-half months from the initial completion date projected. This budget information is of critical importance for a Tribe who chooses to enter into the Negotiation phase in order to realistically determine and plan for the services, functions, programs, activities, and resources it chooses to include in the negotiations.

(2) Opposition to Title III authorization emerged from several political self interest sectors during the 100th Congress and will likely continue. The BIA kept insisting, albeit unsuccessfully, that BIA should sever its trust relationship with the completion of a self-governance compact. Indian education organizations successfully secured their exclusion from Tribal Council authority under self-governance. Montana interests, fearful of Flathead Tribal authority, removed the Flathead irrigation operations from self-governance, And some Indian tribes, particularly those associated with multi-tribal Agency/Area Offices obtained legislative assurance that the demonstration project would not negatively have an impact on them.

The fact that over forty tribes have applied to participate in the second tier of self-governance tribes is a positive sign of increased understanding and acceptance of the self-governance concept in Indian Country. The BIA, at the Agency/Area Office levels, is expected to create mischief and misunderstandings in multi-tribe situations as the self-governance process reaches the negotiation stage. And local non-Indian political interests will undoubtedly oppose enhanced Tribal Council authority.

(3) The initial Self-Governance Demonstration Project Tribes are about to enter into the last half of Phase I of Planning and Research. As of this time the BIA has not yet made an announcement of selection of the second tier Tribes that are to be selected to gain National geographic representation, nor has there been a request of additional resources to accommodate the necessary planning and research that those Tribes selected deem necessary to lay the foundational framework before entering into formal negotiations with the United States government. The Self-Governance Demonstration Project is scheduled to end, five (5) years from the date of it's initial implementation, in 1993. The

second tier Tribe will be on a timeframe that is shrinking as each day passes.

(4) The scope of the BIA's unwillingness to request appropriations or assign personnel to implement the Self-Governance Demonstration Project and the potential negative consequences are outlined in the attached questions submitted to Congress on the BIA FY 90 Budget Justification regarding self-governance. The Bureau continues to assert that self-governance is merely a form of Consolidated Contract funding for self-determination contracts. Distortion of the scope and purpose of self-governance by the BIA is expected.

PROPOSED REMEDIES TO EXTERNAL OBSTACLES

(1) Congressional oversight is necessary to ensure that the BIA, OMB, and the Administration provide the information and support that is necessary to ensure the successful implementation of the Negotiation and Implementation Phases. Congressional intervention may be necessary to ensure that the Tribes have access to all of the appropriate information to determine the resources that the Tribal government should expect in its negotiations with the United States.

(2) The selection of the second tier Tribes of the Self-Governance Demonstration Project should be completed immediately to allow those Tribes the time necessary to complete the planning and research Phase. Resources should be made available to those Tribes of the same level as the first ten (10) Tribes to allow them sufficient time to redesign programs, activities, functions or services now currently operated by BIA.

(3) An educational process will be necessary to ensure that the present Administration at all levels is supportive of the Self-Governance Demonstration Project and are truly committed to a policy of reaffirmation of the government-to-government relationship and Tribes goals towards sovereignty, true self-determination and self-governance.

SUMMARY

It is estimated that in Fiscal Year 1989 approximately $3.1 billion was allocated to approximately 12 various federal departments and agencies for at least 73 different programs to serve American Indian Tribes and their peoples. The Self-Governance Demonstration Project is focused on ensuring that at least a portion of those dollars go to meet the real needs of the people of the Tribal Communities rather than perpetuating the administrative levels of the federal bureaucracy. The BIA and the Department of the Interior are only part of the larger problem of Indian Nations. Each federal department and agency that has a part in administering Indian Programs, and creating Indian policy have participated in a bureaucratic process that, maintains the bureaucracy without being accountable to the people of the Indian Communities.

The Self-Governance Demonstration Project is a historic initiative in that it is setting a new Indian Agenda by reaffirming the government-to-government relationship that has not existed since the end of the Treaty Making Period in 1871. A wave of resistance is expected by those who fear change and do not fully comprehend the implications and potential of the Self-Governance Demonstration Project. Tribes and the United States Government now have the opportunity to make a qualitative change for the people of the Indian Nations across the Country. As true self-determination is an unknown experience over the past century for Indian people and the inertia of the bureaucracy will oppose change, the road ahead is going to be difficult.

The Lummi Tribal Government realizes various hindrances to change will be encountered. Social/Political/Cultural factors, internal political divisiveness, and the predictability of the existing poor economic environment may provide a safety net for those who fear change. The Tribal leadership has mobilized to gain support and to devise strategies for making true self-determination, self-governance, and Sovereignty a reality and not only a concept, idea, or hollow policy. The Lummi Nation now faces the challenge of training and educating our own people to develop the skills and resolve necessary to self-govern and manage a Nation.

The Self-Governance Demonstration Project provides one of the avenues of the Lummi Nation to survive and prosper by gaining control of our human and natural resources. LIBC in Phase I of planning and research is developing a plan that will emphasize and prioritize the stages to the process. Clear objectives will outline the goals and tasks that need to be undertaken and completed to achieve better functioning of the Tribal government at the social, political, economical, technical, and administrative levels.

To make Self-Governance a reality continued Congressional oversight will be necessary to ensure for the successful implementation of the Self-Governance Demonstration Project. In the Congressional Conference Report Language for the FY '88 Interior Department Appropriations for the House Interior & Related Agencies Appropriations Sub-Committee on December 22, 1987 the BIA has been directed to do the following:

(1) "The managers direct the Bureau to analyze all budgets and functions at all levels of the Bureau, and to formulate a proposal for the equitable distribution of resources and service responsibilities between these demonstration tribal governments and the remaining tribal governments in multi-tribal agency and area offices."

(2) "The Bureau should also prepare proposals for reduction or transfer of personnel and consolidation of program functions to accommodate the eventual transition."

(3) "The managers expect the Bureau to work closely with the tribes involved in the demonstration project to ensure the success of this initiative,"

As documented in the Internal and External Obstacles the BIA, intentionally or unintentionally;

(1) have not formulated a proposal for equitable distribution of resources and service responsibilities;

(2) have not prepared proposals for reduction or transfer of personnel and consolidation of program functions;

(3) have not worked closely with Tribes to ensure the success of the Self-Governance Demonstration Project.

What the BIA has done is to delay progress in the internal planning, the internal and external budget research process, and the legal research that the Lummi Tribal Government has deemed necessary to complete Phase I of the Project. The Bureau needs to be continually reminded of its obligations and responsibilities of the Congressional intent of the law. If there is not continued Congressional oversight, the Self-Governance Demonstration Project will only be an idea and not a reality due to the BIA's tactics to create a failure of the Project.

On April 14, 1989 the Lummi Tribal Government received a letter from W. M. Ragsdale the Acting Assistant Secretary - Indian Affairs of the U. S. Department of Interior. The letter states;

> "The Bureau's budgeting system has developed through the years based on historical funding levels. Although there have been attempts to allow an increasing amount of tribal input in the budgetary process, it is true that the funding received in the current year is largely based on the amount received in the year before..... To alleviate this situation, the Bureau is now seeking alternative approaches to minimize the inequities.. The thrust of this project is to determine the total amount appropriate to each specific tribal entity within the amounts available to the Bureau..."

The BIA is again attempting through this supposed equity project to subvert the activities and intentions of true self-determination, self-governance and Sovereignty. Rather than determining how current diminishing funds are to be divided among Tribal governments, it would be more effective and efficient for the Bureau to be preparing for the reduction and transfer of personnel and consolidation of program functions to Tribes. The Self-Governance Demonstration Project was initiated to provide an alternative for the Tribal government to the BIA's systematic inability to manage our resources.

The Tribal Government is now being asked to actively participate in the bureaucratic process of dividing Tribes by using current resources, services, programs and functions as the dividing line. Rather than determining how to divide resources, the Bureau should be determining the resources necessary to meet the real needs of the Indian Nations and their respective governments. The Bureau is creating a facade rather than trying to understand the real issues and to determine solutions. By deciding to allocate or redistribute scarce financial resources among tribes, the Bureau will achieve its cherished goal: maintaining control over Tribes.

This statement also exemplifies the difficulties the Lummi Nation has been experiencing in our Budget Research process. How is the Tribe to determine the resources, programs, services and functions for which it will be eligible to negotiate if the Bureau is not sure of the process it has used for the allocation and distribution of resources? If the Bureau is unsure of it's allocation processes, HOW is the equitable distribution of resources going to be accomplished in the multi-tribe agency? In the multi-tribe agency, HOW can the Bureau prepare proposals for reduction or transfer of personnel and consolidation of program functions?

In Public Law 100-472, The Indian Self-Determination Acts Amendments of 1988 under Title III - The Tribal Self-Governance Demonstration Project it contains the following:

> Section 303 (6), "provide for payment by the Secretary to the Tribe of funds from one or more programs, services, functions, or activities in an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act, including direct program costs and indirect costs, and for funds which are specifically related to the provision by the Secretary of Services, and benefits to the Tribe and its members."
>
> (7) "shall not allow the Secretary to waive, modify or diminish in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians which exists under Treaties, Executive orders, and Acts of Congress;"
>
> (9) (b) (1) (e) "to the extent feasible, the Secretary shall interpret Federal laws and regulations in a manner that will facilitate the agreements authorized by this title.
>
> Section 306. "Nothing in this title shall be construed to limit or reduce in any way the services, contracts, or funds that any other Indian tribe or tribal

> organization is eligible to receive under Section 102 or any other applicable Federal law.."

The Lummi Tribal government consider these points to be of critical importance to the legal and budgetary research, internal tribal government planning and organizational preparation, and the negotiation process. Congressional oversight will be necessary to ensure that the Congressional intent of the law is obeyed.

As the planning and research phase of the project nears completion it becomes evidently clear that initial Tribal appropriations are not going to be adequate to comprehensively complete the necessary planning and research. Many of the phases of internal planning and organization will necessitate continued research, such as in the Constitution Revision Process. Once we have completed an acceptable draft revision, it will be necessary to develop educational materials which will explain to the Tribal Community the drafted changes and allow for Community input and comment. The LIBC has already experienced and realized the extensive amount of human and financial resources required to conduct this type of communications with the Tribal Community. This will only begin the initial phase of the revisions of Tribal documents, by-laws, codes, statutes, etc. that will be necessary to begin to create a governmental structure that is truly self-determining, self-governing, and sovereign.

The LIBC, during the initial phases of the project, developed a budget that would adequately facilitate the transition phase of the Tribal government from one that allows BIA interference and control to one that operates as a Sovereign Nation. It was determined that a budget of $400,000 would be sufficient to accomplish the planning and research necessary to complete the transition. The resources appropriated for the Project are being used in the most effective and efficient manner possible. However, it must be made clear that the Lummi Tribal Government does not find that these resources are totally adequate to accomplish the many important tasks that must be comprehensively completed.

The Lummi Nation realizes that there are many formidable obstacles that yet need to be overcome. However, LIBC is committed toward making the ideas of the Self-Governance Demonstration Project a reality and simply not a concept.

In May, 1989, a concept paper on the Lummi Self-Governance Demonstration Project was written, which states:

> "The Self-Governance Demonstration Project is a historic effort to break a pattern of dominance and dependency. While some federal programs in the past have allowed Indian tribes to implement certain limited programs, self-governance offers the chance for us to assume total control of our economic, political, and social futures, and demonstrate that we can accomplish

> what the BIA has not been able or willing to do in 120 years."

The Lummi Tribe is committed to a future reality of self-governance and sovereignty. Our forefathers in their wisdom and vision negotiated the Treaty of Point Elliot for the future generations of the Lummi Tribe. Our generation recognized the consequences of dependency and bureaucratic domination to our collective spirit. Through these goals of self-determination and self-sufficiency, our vision also is on the future generations of the Lummi Tribe.

QUESTIONS ON THE SELF-GOVERNANCE DEMONSTRATION PROJECT FOR BUREAU OF INDIAN AFFAIRS WITNESSES BEFORE THE HOUSE INTERIOR AND RELATED AGENCIES APPROPRIATIONS SUBCOMMITTEE

April 4, 1989

BACKGROUND

The Congress appropriated $1 million dollars in FY 88 to initiate a Self-Governance Demonstration Project with ten volunteer tribal governments who were designated for the project. These tribes were to initiate legal and budgetary research as well as internal reorganizational planning towards the implementation of negotiated agreements with the Bureau of Indian Affairs wherein the tribes would assume responsibility for various Bureau functions beyond self-determination contracting at the Agency, Area, and Central Office levels. Another $1.2 million was provided in FY 89 to assist the original ten tribes in their research and planning as well as support several other tribes to embark on this experimental initiative.

In the last session of the 100th Congress, the "Indian Self-Determination and Educational Assistance Act Amendments of 1988," P.L. 100-472 authorized a Title III "Tribal Self-Governance Demonstration Project." The Act authorizes a two year planning and three year implementation phases for twenty tribes to receive "payment by the Secretary to the tribe of funds from one or more programs, services, functions, or activities in an amount equal to that which the Tribes would have been eligible to receive under contracts and grants under this Act, including direct program costs and indirect costs, and for any funds which are specifically related to the provisions by the Secretary of services and benefits to the tribe and its members."

QUESTIONS:

1) Senator Inouye, Chairman of the Senate Select Committee on Indian Affairs and House Interior and Related Agencies Appropriations Subcommittee Chairman Yates made clear to the Bureau in a 12/21/88 letter that the original ten Self-Governance Demonstration tribes "should be able to submit a statement outlining the basis for continuing a second year of planning and justifying the amount needed up to $100,000 for each tribe." As March 31, 1989 completed the first twelve month planning period for these original ten tribes, what is the status of these second year planning grant allocations?

2) The Bureau of Indian Affairs FY 90 Budget Justification eliminates any appropriations for the Self-Governance Demonstration Project with the following reasoning:

"No results or recommendations have been received from the demonstration projects funded in FY 1988 or FY 1989. Further funding of this initiative should await reports from the projects so that the results may be analyzed."

a) Has the Bureau officially sought appropriations recommendations or requested information from these demonstration tribes?

b) Since the Bureau is fully aware that ten more Self-Governance Demonstration Projects were authorized in P.L. 100-472, how does the Bureau propose to support their planning grant requests?

c) As the original ten tribes will be proposing negotiated agreements in FY 90 which will most likely require extensive reorganization at the Area/Agency levels, how does the Bureau expect to successfully complete negotiated agreements with no assigned FTE's?

d) Given the fact that Congress has acted on three separate occasions to support the Self-Governance effort, why is the Bureau refusing to request funds for planning grants or administrative personnel to implement this project?

3) The Committee expects during this second year planning stage that a number of the original ten self-governance tribes will be approaching the Bureau with negotiation agreement proposals. Has the Bureau prepared plans to reorganize operations at Agency/Area levels, in particular, to accommodate these tribal requests and still provide the same level of service to other tribes in the geographic vicinity?

4) Participating Self-Governance Demonstration tribes have reported difficulty accessing Bureau budget data at all levels and expressed their concerns directly to Acting Assistant Secretary Ragsdale at a January 13, 1989 meeting. These tribes obviously can't be expected to prepare budget plans without clear delineations of Bureau budgets and personnel functions. Explain to the Committee why this essential budget details is so difficult to access and how the Bureau plans to address these legitimate budget documentation requests from the Self-Governance Demonstration Tribes.

5) Since July 1988, several Self-Governance Demonstration tribes have been waiting for a BIA response as to planned allocation criteria for proposed distribution of budgets. As these budget allocation criteria are extremely important for tribal planning at the Area/Agency level, when do you expect this proposed information will be available?

6) Participating Self-Governance Demonstration Tribes have reported an apparent growing discrepancy between the Bureau and the Tribes as to the scope of the Self-Governance Demonstration Project; namely, that the Bureau perceives the project narrowly as merely a consolidation of self-determination contracts while the participating tribes envision a broad assumption of functions, activities, and services. How broadly does the Bureau envision the availability of Agency/Area/Central office resources to negotiation?

7) In a related matter, the Committee has been informed that the Bureau is considering foregoing the planning grant process with selected second tier tribes and may propose an immediate negotiation stage. How will the Bureau ensure, in these instances, that the tribes have full cognizance of available budget functions and are organizationally as well as legally prepared to initiate a self-governance project without the planning phase?

8) The Committee has heard testimony this year that the Bureau is selectively transferring programs and functions out of the Agency and Area levels to avoid potential transfer to a Self-Governance tribe, and, that contractual funds have been withheld from participating Self-Governance tribes due to their Self-Governance status. How do you respond to these allegations?

9) The Bureau has requested no appropriations for the Self-Governance Demonstration Project in its FY 90 Budget Justification. How does the Bureau plan to support the extensive administrative reorganization, particularly at the Agency/Area levels, and legal review of proposed negotiated agreements to be completed in FY 90 in preparation to implement expected negotiated agreements?

10) The Tribal Self-Governance Demonstration Project authorizing legislation, P.L. 100-472, Title III, Section 305 requires Bureau and Tribal bi-annual progress reports "based on mutually determined baseline measurements jointly developed by the Secretary and participating tribes...." As these progress reports will provide the only quantifiable measure of project success to Congress, please describe Bureau and tribal separate or mutual developments on this important element to this demonstration to date.

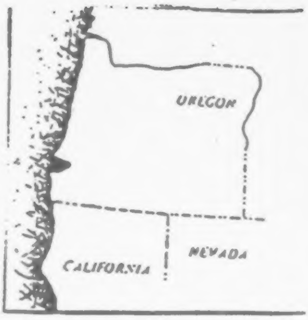
11) What contingency plans has the Bureau made to reallocate existing operational funds to fully address the needs of the second tier tribal planning grants if no supplemental appropriations materialize in FY 89 for this purpose?

12) The Bureau is requested to provide to the Committee all instructional communications provided to affected Area/Agency personnel regarding the Tribal Self-Governance Demonstration Project from December 22, 1987 to the present.

13) What technical assistance has the Bureau provided the original ten Self-Governance Demonstration tribes in their planning efforts?

Coquille Indian Tribe

NON-PROFIT



FACT SHEET

CHAIRMAN: Wilfred C. Wasson

RESTORATION CHAIR: Linda Procter

LOCATION: Coos, Curry, Douglas Counties
South Coast Oregon

POPULATION: 560 Members

TREATY: In 1855 the Coquille Indian Tribe signed a treaty with the United States (unratified).

COQUILLE RESTORATION ACT: HR 881. Hearing, 11:30 AM, May 17, 1989, House Interior & Insular Affairs Comm., 1324 Longworth HOB

EFFECTS OF RESTORATION:

- Resumption of federal guaranteed services (health, education, resource protection).
- Reestablishment of government-to-government relationship with the United States.
- Strengthening of tribal identity.
- Makes possible tribal self-sufficiency.
- Tribe-run services for tribal members.
- Economic benefit to entire population of Coos, Curry, Douglas Counties.

GOVERNMENT STRUCTURE:

Tribal Council
Burial Committee
Constitution Committee
Enrollment Committee
Personnel Committee
Restoration Committee

GOVERNMENT FUNCTIONS:

Economic development actions
Government-to-government interaction on behalf of tribal members
Protection of aboriginal rights
Protection of cultural sites and practices
Enrollment of members

TERMINATION 1954 PL 83-588: No tribal consent obtained

SUPPORT: Includes: Oregon Indian Tribes and organizations, Governor of Oregon, County Commissioners, City of Bandon, City of Coos Bay, City of Coquille, City of Myrtle Point, City of North Bend. Entire Oregon Congressional delegation, The Oregonian, local and state churches.

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THE COQUILLE INDIAN TRIBE
EXECUTIVE SUMMARY
IN SUPPORT OF COQUILLE RESTORATION

HISTORICAL

In the pre-reservation era, before 1855, the native peoples now known as Coquille lived in three focal areas: at the mouth of the Coquille River; in the south slough area to the north; and along the Coquille River with a primary village at the forks (near Myrtle Point). The Coquille in prehistoric times constituted a single ethnic group in their cultural similarity, resource ritual exchanges, and intermarriage patterns. After the United States took their land without compensation, Coquille Tribal members homesteaded allotments of land in their aboriginal territory without compensation. The Tribe successfully pursued its land claim from 1929 to 1960, and maintained other governmental functions.

TERMINATION

On August 13, 1954, Congress passed Public Law 83-588, terminating federal recognition of the Coquille Indian Tribe. That act took place without Tribal consent, a result of Congress' plenary power. The Western Oregon Termination Act ended federal services to tribal members and led to the removal from trust and eventual sale of all Coquille land.

COQUILLE TRIBAL GOVERNMENT

The Coquille Tribe restructured its Tribal Government in 1977. In accordance with the Coquille By-laws, the Tribe's governmental base is the Tribal Council, which consists of 7 council seats with staggered terms. The tribal council holds annual elections.

RESTORATION

For nearly thirty-four years, the Coquille Tribe has continued to function despite termination. Termination is a policy repudiated by the Congress and by Presidents Nixon, Ford, Carter and Reagan. It is referred to in a 1981 Oregonian editorial as "an experiment, a seed sown in adversity and watered by tears". Its painful legacy lives on. This is particularly true in the State of Oregon, where 60% of all terminated tribes were located. In 1981, the Oregon legislature passed Senate Joint Memorial 12 condemning termination and urging restoration. To date five confederations of Oregon Tribes have been restored: The Confederated Tribes of Siletz (1977), The Cow Creek Band of Umpquas (1982), Confederated Tribes of Grand Ronde (1983), The Confederated Tribes of Coos, Lower Umpqua & Siuslaw (1984), and The Klamath Tribe (1986).

Coquille Restoration would re-establish the government-to-government relationship between the Tribe and the United States. Restoration would restore Indian health and education services now denied the Coquille as terminated Indians. Economic development opportunities available to federally recognized Indians would be opened to Coquille and make way for development of tribal enterprises. These could provide employment to tribal members and nonIndians and contribute to the economy of the region. (No small thing in one of the most severely depressed areas in the State of Oregon.) Furthermore, Coquille Restoration would be consistent with President Reagan's Indian policy which advocates that every effort should be made to encourage self-determination, self-sufficiency and a strengthening of government-to-government dealings between Tribes and the Federal Government.

SUPPORT

The Coquille Tribe has gathered considerable tribal support for its Restoration effort. It has national and state tribal endorsements including the National Congress of American Indians, Affiliated Tribes of Northwest Indians, Tribes of Oregon, and the Oregon Commission on Indian Services.

Governor Neil Goldschmidt supports Coquille Restoration as do State Senator Bill Bradbury and State Representative Peg Jolin. Church support is also widespread, including Ecumenical Ministries of Oregon.

Local support includes; Coos County Commissioners, Curry County Commissioners, Coos Bay City Council, City of Bandon, numerous churches, Port of Coos Bay, Port of Bandon. This is only a small part of the entire list.

Restoration would be a legislative act of justice, a legal righting of an old wrong. But more important than that, it would strengthen Coquille Tribal identity by freeing Coquille people from the limbo in which termination has placed them. It would renew the Tribal identity of Coquille youth, strengthen cultural and historical ties to other Tribes and rekindle hope in Coquilles, both young and old, that there is, indeed, justice in America. The Coquilles have not forgotten the solemn sincerity with which their Grandfathers signed the Treaty of 1855. A great deal was relinquished on the promise that their descendants would retain their sovereignty, and their government-to-government relationship with the United States. As Supreme Court Justice Hugo Black stated so simply and eloquently:

> "Great nations, like great men, keep their word".

The Coquilles have kept theirs; they ask Congress to do so also.

A SOCIOECONOMIC ASSESSMENT OF THE COQUILLE TRIBE

EXECUTIVE SUMMARY

For many centuries, the Coquille Indians enjoyed a rich cultural heritage that developed in an environment of abundant natural resources. The Coquille River Valley and adjacent areas on Oregon's South Coast were rich in salmon, game, roots, shellfish, and other natural resources. The Tribe's wealth was abruptly lost as miners and settlers poured into their territory in the mid-19th century. By 1900, only a few thousand acres remained in Coquille hands in the form of Indian allotments.

Despite this loss, tribal members enjoyed a decent standard of living at the time of federal termination of their government-to-government relationship with the U.S. in 1954. Since termination, the well-being of the Tribe worsened so that the people's socio-economic status is far worse than that of Oregonians in general.

This assessment is the first attempt to evaluate comprehensively the current socio-economic conditions of the Coquille Indian people. The Oregon State University Survey Research Center and the Coquille Tribe prepared the survey. They sent it to 164 Coquille households in November 1987. The Coquille Tribe located an additional 62 households through work with the original 164 and they were immediately sent surveys. It is significant that the Tribe played a major role in developing the information it contains. The work is an expression of their continuing efforts toward self-sufficiency as a people.

The following table summarizes data in the body of this report.

SOCIO ECONOMIC FACTOR	COQUILLE INDIANS	ALL OREGON
Population	527	2,690,000
Under 25 years of age	45%	37%
Over 55 years of age	12%	22%
Average Family Size	3.0	2.6
Female Head of Household	16%	8%
Persons below poverty line	25%	11%
Household receiving public assistance	11%	4%
Families below poverty line with children under 18	29%	6%
High school graduates	84%	76%
College graduates	18%	18%

NEIL GOLDSCHMIDT
Governor

1859

OFFICE OF THE GOVERNOR
STATE CAPITOL
SALEM, OREGON 97310-1347

July 13, 1988

Congressman Morris Udall
Chairman, House Interior Committee
235 Cannon House Office Building
Washington, DC 20515

Dear ~~Congressman Udall~~: Mo,

I write in support of Congressman Peter A. DeFazio's bill to restore to federal recognition the Coquille Tribe of Indians, in the State of Oregon.

The Coquilles are among the Western Oregon Indian tribes terminated by Congress in 1954. We have since realized that termination was a mistake in most cases, and resulted in a deterioration of cultural identity and also in economic power.

The Coquilles are the only tribe in Western Oregon which is still eligible to have recognition restored. Beginning in 1977, Congress restored the Confederated Tribes of Siletz Indians, the Cow Creek Band of Umpqua Indians, the Confederated Tribes of the Grand Ronde Community of Oregon, and the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians.

In all previous cases, restoration of tribal rights brought greater community stability and cultural awareness to the tribe. The Coquilles are strongly in favor of restoration, and it is supported by other Indian tribes and organizations in Oregon.

Congressman DeFazio is to be congratulated for taking the lead in restoration of federal recognition to the Coquilles. He has my strong support, and I urge you to give this measure your favorable consideration.

Sincerely,

Neil Goldschmidt
Governor

NG:dkc
4204S

c: Oregon Congressional Delegation
Michael D. Mason ✓

OREGON LEGISLATIVE ASSEMBLY—1981 Regular Session

Senate Joint Memorial 12

Sponsored by Senators ISHAM, JERNSTEDT, KITZHABER, KULONGOSKI, McFARLAND, POTTS, RIPPER, Representatives BRADBURY, BROGOITTI, GRANNELL, HANNEMAN, KERANS, MARKHAM, PRIESTLEY, RIJKEN (at the request of Commission on Indian Services)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Memorializes Congress to formally repudiate the policy which resulted in termination of federal recognition of and responsibilities toward certain Indian tribes. Memorializes Congress to restore recognition.

SENATE JOINT MEMORIAL 12

To the Honorable Senate and the House of Representatives of the United States of America, in Congress assembled:

We, your memorialists, the Sixty-first Legislative Assembly of the State of Oregon, in legislative session assembled, most respectfully represent as follows:

Whereas the congressional decision in 1953 to terminate the Federal Government's responsibilities to those Indian tribes listed at 25 U.S.C. 564 et seq. And 691 et seq. has had significant, long-lasting and deleterious effects in Oregon; and

Whereas the Federal Government since 1970 has substantially repudiated the policy of termination in as much as both the executive and legislative branches have increasingly recognized federal responsibilities to Indian tribes and have sought to strengthen tribal abilities to respond to Indian needs; and

Whereas Congress has never expressly renounced the termination philosophy embodied in House Concurrent Resolution 108; and

Whereas the vestiges of this ill-advised action continue to plague "terminated" Indian tribes and their members in Oregon and to thwart tribal efforts to improve social, political and economic development and self-sufficiency; and

Whereas the disastrous effects of this policy are still evident in the relationships of Indian tribes and their members with state and local governments in Oregon; now, therefore,

Be It Resolved by the Legislative Assembly of the State of Oregon:

(1) The Congress of the United States is memorialized to repudiate formally the policy which resulted in the termination of the Federal Government's recognition of, and faithful execution of its trust obligations towards, certain Indian tribes.

(2) The Congress of the United States is further memorialized to establish equitable procedures for the restoration as quickly as possible of recognition of those Indian tribes whose federal recognition has been terminated.

(3) A copy of this memorial shall be transmitted to the President of the United States and to each member of the Oregon Congressional Delegation.

NOTE: Matter in bold face in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted:

The Oregonian

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THURSDAY, JUNE 23, 1988

Restore Coquilles' tribe

Passage of the bill in Congress to make the Coquille Indians a tribe again would be a long-overdue act of justice.

Two acts of Congress in 1954 ended the tribal status of 63 Indian tribes in Oregon. They were supported with the argument that Indians should be full-fledged citizens, freed from federal paternalism.

The terminations turned out to be disastrous for the Indians. They suffered from the loss of government protections and benefits. Many were not prepared to compete in the white man's world.

In a remedial series of acts in recent years, Congress has restored tribal status and federal benefits to most of the Indians of Oregon. The Coquilles (they pronounce the name Co-KWIL) are the last Indian group in the state known to be seeking tribal restoration.

This month Rep. Peter DeFazio, D-Ore., introduced a bill in the House that would accomplish that. It would entitle the Coquilles to the medical, economic and educational benefits federal law provides for Indian tribes. Most important, said the tribe's restoration chairman, Linda Procter, it would give them back the dignity of dealing with the federal authorities as government to government.

Historically the Coquilles lived in scattered villages on the Southern Oregon coast roughly in a triangle from present-day Coos Bay to Bandon and up the Coquille River as far as Myrtle Point. Today 527 persons are on the tribal roll, 70 percent of whom live in Western Oregon — 40 percent in the Coos Bay-Bandon area.

DeFazio's restoration bill grants them no reservation land and no special hunting, fishing, trapping or water rights. With its passage, the Coquilles would qualify for federal money to develop an economic plan. That plan might lead later to a proposal for a tribal center, but providing it with federal resources would take another act of Congress.

The county commissions of Coos and Curry counties, along with several other Indian tribes, support the restoration. The only visible opposition to the bill has come from the federal Bureau of Indian Affairs. It has recommended that Congress ask the bureau to study whether the Coquilles qualify for recognition as a tribe.

But the federal government has been dealing with the Coquilles, by name, in treaties, laws and court cases going back as far as 1855. Studies by anthropologists at Oregon State University, as well as the tribe's own records, are available to document its history, culture and the current depressed economic status of many of its members.

Testimony before Congress could bring out in days the information that a study by the Bureau of Indian Affairs could take years to complete. The Coquilles deserve a prompt hearing, and a favorable one.

Comment: *Support for Coquilles*

The Coquille Indians and members of neighboring tribes paid our community a great tribute Saturday as they put on a highly successful native American salmon bake.

The event brought more than 1,000 people to First Street to learn more about Indian culture, join in friendship dances, dine together and explore their history via a Coquille-sanctioned archeological exploration of a former village site on Bill and Karen Smith's property.

Both the past and present were intertwined, with the Coquilles repeating a blessing once used by earlier tribesmen. The bones of the first of many salmon baked in the large pit were blessed and returned to the river to tell the other salmon how well they were treated so that more would come. The Indians have a reverence and oneness with nature that we could all benefit from learning.

It was a most enjoyable day of shared cultures, and of drawing people into the wonder of heritage and where we all came from. We hope this can become an annual event, again combined with future research on the tribe's history via archeological exploration.

It was also a day of hope that we can all work together to see the tribal status of the Coquilles reinstated. A bill to restore their government-to-government relationship with the U.S. has been introduced in the House by Rep. Peter DeFazio. Sen. Mark Hatfield, who visited the site Saturday, pledged his support.

The Coquilles are the last of numerous Oregon tribes "terminated" by the U.S. government by two acts of Congress in 1954 to be reinstated. When the government told them they were no longer Indians, the tribal members did not buy that. They maintained a tribe roster, officers and much of their culture. The tribal roll today numbers 527 people, with 40 percent of them living in the Coos Bay and Bandon areas.

With termination, the Coquilles and other tribes lost many government protections and benefits — health, education, low-interest financing and more — granted other tribes. DeFazio's bill would entitle the Coquilles to the medical, economic and educational benefits federal law provides the other tribes. Some of that money will be allocated to develop an economic plan, and with future Congressional action, could lead to funding of a tribal center.

The tribe, which said it has received much support from the local community so far, sees Bandon as the location of this future center.

DeFazio's bill is supported by the Coquilles, many other tribes and local government agencies. It is opposed, however, by the Bureau of Indian Affairs, who want Congress to authorize a study to see whether the Coquilles qualify for recognition as a tribe.

There is plenty of evidence, both current and historical, to recognize their tribal status now. No money needs to be spent on that kind of study; save it for helping the Coquilles and the people of Bandon learn more about their heritage through efforts such as the current archeological study.

Money raised at the salmon bake will help the Coquilles fund efforts to advance DeFazio's legislation and will also help the Bandon Historical Society, which houses a display of Coquille artifacts. We can help further by urging our Congressmen to allow the Coquilles a speedy Congressional hearing and then act favorably on their request "to be Indians" once again.

Melody Gillard-Juarez

Coquille Indian Tribe

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GLENN VANORTWICK

Letters and Resolutions In Support of Coquille Restoration

1.	Coquille Tribal Council	July 1, 1985
2.	Burns Paiute Tribe	Oct. 27, 1987
3.	Confederated Tribes of the Coos, Lower Umpqua & Siuslaw Indians	March 12, 1988
4.	Confederated Tribes of the Grand Ronde Community of Oregon	Oct. 19, 1988
5.	Confederated Tribes of Siletz Indians	Jan. 22, 1988
6.	Confederated Tribes of the Umatilla	Oct. 21, 1987
7.	Confederated Tribes of the Warm Springs	June , 1988
8.	The Klamath Indian Tribe	Oct. 21, 1987
9.	The Suquamish Tribe	Sept. 30, 1987
10.	Affiliated Tribes of Northwest Indians	Jan. 13, 1988
11.	National Congress of American Indians	March 4, 1988
12.	Americans for Indian Opportunity	March 30, 1988
13.	Governor Neil Goldschmidt	July 13, 1988
14.	Oregon Commission on Indian Services	Jan. 11, 1988
15.	Senator Mark O. Hatfield	June 27, 1988
16.	Senator Bob Packwood	Jan. 26, 1988

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17.	Coos-Curry Council of Governments	Oct. 8, 1987
18.	County of Coos, Board of Commissioners	Oct. 9, 1987
19.	County of Curry, Board of Commissioners	May 11, 1987
20.	City of Bandon	April 21, 1987
21.	City of Coos Bay	Oct. 13, 1987
22.	City of Coquille	Nov. 16, 1987
23.	City of Myrtle Point	Nov. 4, 1987
24.	City of North Bend	Nov. 10, 1987
25.	Port of Bandon	Nov. 17, 1987
26.	Port of Coos Bay	Nov. 10, 1987
27.	Bill Bradbury, State Senator	Dec. 18, 1987
28.	Peg Jolin, State Representative	Dec. 2, 1987
29.	Chris Short, International Woodworkers of America	Oct. 26, 1987
30.	Bandon Chamber of Commerce	June 21, 1988
31.	Professor Charles F. Wilkinson University of Colorado School of Law	June 7, 1988
32.	Ronald McCormick, Forest Supervisor Siskiyou National Forest	April 25, 1988
33.	Peg Pullen, Bureau of Land Management	Nov. 15, 1987
34.	Jerry Horn, Director Children Services Division Southern Oregon	Sept. 9, 1987
35.	Francis A. Mabry, Director Children Services Divsion Curry County	Sept. 15, 1987
36.	M. John Spicer, Chairman Curry County Health District	Sept. 25, 1987
37.	Herbert J. Hooker, Jr. Gold Beach Police Chief	Sept. 28, 1987

38.	Dale Luscha, Director Star of Hope	Dec. 2, 1988
	W.H. Gauntlett Curry County Sheriff, (retired)	Sept. 15, 1987
39.	Allen L. Johnson, Esq., Eugene	June 21, 1988
40.	Evelyn Conroy-Sparks, Esq., Portland	June 15, 1988
41.	The Casino	Sept. 12, 1987
42.	Crawford Enterprises	Sept. 15, 1987
43.	Enlund Equipment	Sept. 11, 1987
44.	The Homestead	Sept. 11, 1987
45.	Ken's Saw Shop	Sept. 10, 1987
46.	McCarthy Bros. Inc.	Sept. 12, 1987

Coquille Indian Tribe
NON-PROFIT

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CHURCH SUPPORT FOR

COQUILLE TRIBE RESTORATION

Ecumenical Ministries of Oregon	July 22, 1988
Pastor Stuart R. Shaw, First United Methodist Church	Dec. 14, 1987
Pastor J.M. Turkington, Charleston Community Church	Nov. 5, 1987
Donald B. Eaton, Vicar St. James Episopal Church	Dec. 30, 1987
John L. Ward, Pastor Faith Baptist Church	Dec. 30, 1987
Father Shray, Holy Name Catholic Church	April 20, 1988

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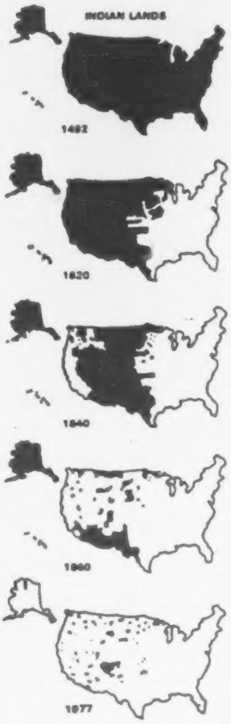
Tribes Fighting to Reverse Termination

by Donald R. Wharton

Donald R. Wharton, J.D., is Director of the Native American Program Oregon Legal Services. He has served as special counsel to the American Indian Policy Review Commission and as counsel to the Organization of the Forgotten Americans.

The Center for Urban Education is currently providing assistance to three terminated Indian tribes seeking restoration of their federal status. (See "News" section of this issue of the CUE Bulletin*).*

This article was first published in the Oregon State Bar Bulletin.



In 1954, the federal government conducted experiments to "Americanize" Native Americans. These experiments are formally known as the Klamath Termination Act (25 USCA ss 564) and the Western Termination Act (25 USCA ss 691 et seq). Simply stated, by Federal condemnation of Indian reservations and severence of their tribal ties with the U.S. Government, it was assumed that the terminated tribe members would move into non-Indian communities and adopt American apple pie culture and lifestyles. These experiments—based on a 'sink or swim' hypothesis—affected the course of life of 64 Oregon Tribes.

The impetus for the termination acts stemmed from the Congressional policy embodied in House Concurrent Resolution 108. HCR 108, adopted in 1953, set forth the principal that federal supervision of Indian people should be ended as rapidly as possible. Like so much of the federal Indian policy which preceded, termination was poorly conceived, implemented without serious consideration given to what the Indian people wanted and undertaken for reasons foreign to the tribes' best interests. Given this state of affairs there is small wonder that termination resulted in uniform failure.

Oregon: Disproportionate Suffering

The termination philosophy was espoused by Sen. Arthur V. Watkins from Utah. By his second term he was chairperson of the Indian Affairs Subcommittee of the Senate Committee on Interior and Insular Affairs which held sway over every piece of legislation which affected Indian tribes and people. During the 83rd Congress the senator was ardently pressing for termination of all federal relations with Indian tribes.

His position was based on the 1949 Hoover Commission Report on Indian Affairs which recommended "complete integration" of Indians. But the "emancipation" of the Indian was not his only motivation. As part of the first Republican dominated Congress and White House since the New Deal he was thoroughly committed to reducing federal bureaucracy and spending. In the termination policy he saw an excellent opportunity to not only reduce federal expenditures but to eventually do away entirely with an agency of the federal government, the Bureau of Indian Affairs (BIA).

Watkins saw the BIA as inefficient, oppressive and wasteful, serving few of the needs of the tribes or Indian people and costing millions every year. While tribes generally shared his view of the BIA they also saw the bureau as the federal government's prime agency for sustaining the solemn trust responsibility owed to the tribes by the United States. And while tribes were frustrated with the failings of the BIA they by no means sought its abolition. There was, in fact, overwhelming Indian opposition to termination.

HCR 108 carried within it direction to the Secretary of the Interior to draft legislation implementing the policy. The secretary, therefore, was required to identify those tribes thought to be ready for termination and assimilation. No objective criteria exists and a profile of the tribes selected offers no obvious reflection of what the criteria may have been. The selections appear arbitrary and more a matter of the political inability to resist the forces of termination than any objective measure of their preparedness for assimilation.

The new Secretary of the Interior in 1953 was Douglas McKay, former governor of Oregon and an announced supporter of the termination policy. That goes far to explain why Oregon Indians suffered so disproportionately under the termination experiment.

Sixty percent of all the tribes terminated were Oregon tribes. Sixty-three percent of the Indian land base affected was in Oregon. Nearly a million acres of Indian owned lands passed out of Indian ownership as a direct result of the termination acts. And no Oregon Indian was ever offered an opportunity to receive his/her share of tribal assets in an individually held parcel of land. It was all sold by non-Indians to non-Indians.

The termination acts were never sought by the tribes. Draft bills were prepared by the BIA who forwarded them to the affected tribes. Tribal officials then had from 20 to 40 days to respond. The bills were often long and complex. Their responses were to be heard at hearings to be held in Washington, D.C. The BIA told tribes they could use tribal funds to send representatives to Washington to present their views. None of the Western Oregon tribes had any such funds. The same offer was made to use nonexistent funds to hire attorneys, subject to BIA approval of the contract.

The Klamath Tribe was sending representatives to Washington for different reasons and the tribal council authorized them to speak in opposition to the legislation while they were there. They were rudely treated by Sen. Watkins during their testimony. They were also told that the other purpose for which they were in Washington was in jeopardy. They had come to seek Congressional passage of a distribution plan and appropriation of $2.5 million the tribe had won in an Indian Claims Commission suit against the United States. These bills had to pass through Sen. Watkins' Indian subcommittee. The representatives were told that there would be no legislation for the distrubtion of their money until the termination bill was agreed upon by the tribe.

Hearings were held at the Klamath agency on termination. The tenor of the hearing made it clear, however, that termination was a foregone conclusion and only the terms of the act were at issue. Nonetheless the Klamath Tribe never voted to accept termination. It may be said that they acquiesced in its passage. But then their consent was never required. Congress had the power to unilaterally pass the legislation over even strong objection. The Klamaths were simply too politically factioned to resist.

The Klamaths were allowed under the terms of the act to elect how to receive their share of tribal assets, some 862,662 acres of prime timber land. Their options were either to receive a per capita share in a money distribution of a liquidated portion of the tribal lands or to receive an undivided interest in a parcel of land to be managed by an unidentified private trustee. The terms of the trust were unknown.

Information was contradictory and much too complex and lengthy for most tribal members to read or understand. Fear of losing everything led most (77 percent) to opt in 1958 for receipt of their share in a per capita distribution. The shares of those who didn't vote were placed in the trust. Enough lands were sold to satisfy payment to the withdrawing members in 1961. All but 10,000 acres of that land was taken by condemnation for the Winema National Forest.

The Klamaths who remained in the trust arrangement voted in 1969 to discontinue the trustee. The trustee arranged for sale of the remaining land to the United States by condemnation to be added to the Winema National Forest. The remaining members were not allowed the option of obtaining a new trustee or of receiving an individual parcel of land.

Within twenty years of the Klamath Termination Act virtually the entire tribal estate had passed out of Indian ownership. It was done, moreover, in a manner that precluded individual Klamaths from acquiring their portion of the estate in an individually held parcel.

For the Confederated Grand Ronde and Siletz Tribes the process was crudely similar. Their lands were turned over to a private trustee for sale to the highest bidder. Once again the bulk of the land passed out of Indian ownership, in this case within five years of the Western Oregon Termination Act.

One group of tribes did vigorously oppose termination. The Coos, Lower Umpqua and Siuslaw Tribes sent representatives to a meeting with the BIA at Siletz, Oregon with directions to oppose termination. Present leaders of the tribes maintain that their representatives were removed from the meeting when they voiced their opposition and locked in a separate building. Although they were assured afterwards that the vote in favor of termination would not affect their tribes, when the Western Oregon Termination act was passed they were listed with every other Western Oregon tribe.

The Cow Creek Band of the Umpquas received no notice of any kind. In fact, after signing their treaty on Sept. 19, 1853, the United States ceased to have any further dealing with the tribe. Tribal members had retreated deep into the Cascades to avoid removal to the Grand Ronde Reservation. Later efforts to obtain recognition services or benefits from the BIA were all rebuffed. They received no notice of any policies affecting them and heard nothing at all of termination until it was already accomplished. Congress had terminated a tribe that the United States had never treated as a recognized tribe except for a single meeting to sign a treaty one hundred years before.

Disastrous Consequences

The consequences of termination were disastrous. That's hardly a surprise when the process is reviewed. Absolutely no planning was done to prepare the tribes or Indian people for the transition. In over 1,700 pages of testimony there isn't a single report by any professional trained in the social sciences. No forethought of any kind went into the implementation of the policy.

The tribes and their members were simply cast aside, with their economic base wiped out, their land base sold, a whole new set of state laws to learn including taxation of lands bereft of the educational and health benefits available to all other recognized Indians, and without the tribal institutions to which they had looked in the past for assistance. Most difficult of all was the psychological pressure of being told they were no longer Indians. To be sure many had all or most of the skills to function successfully in the dominant culture. But for far too many, it was more than they were prepared to cope with.

An admitted failure, the termination policy has been repudiated by both the Congress and every president since Richard Nixon. The Oregon Legislature passed Senate Joint Memorial 12 in the 1981 session condemning termination and urging restoration of those Oregon tribes subjected to the policy. Congress has since 1973 restored four tribes to federal status, including the Siletz Tribe of Oregon.

Other tribes, including the Confederated Tribes of Grand Ronde, the Coos, Lower Umpqua and Siuslaw, and the Cow Creek Band of the Umpquas, are actively seeking restoration. The Klamaths and Coquilles have expressed some interest.

The task of those tribes in seeking the reversal of the termination policy and restoration of their status is formidable and expansive. Convincing Congress to pass the necessary legislation is a far more telling exercise than the original act which was accomplished for sixty-four tribes in a mere nine months.

1981

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUL 26 1989

Honorable Daniel K. Inouye
Chairman, Senate Select Committee
on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Inouye:

Enclosed are the answers to the follow-up questions of the Senate Select Committee on Indian Affairs' oversight hearing held on Friday, June 9, 1989, regarding implementation of P.L. 100-472, the Amendments to the Indian Self-Determination and Education Assistance Act.

Should you have any further questions, please contact us.

Sincerely,

Eddie F. Brown
Assistant Secretary - Indian Affairs

Enclosure

Identical letter sent to Vice-Chairman John McCain

Question #1: With respect to the decision of the IHS and BIA to rewrite the regulations in-house before any further participation by tribes, do you believe the thirteen months required by the schedule after the joint meetings with the tribes at the area level in August will provide any meaningful opportunity for tribal input? If so, how?

Answer: Yes. Following the publication of the Notice of Proposed Rule-Making there will be a 60 day comment period. This is another important and critical time for tribal input in the rule-making process. In addition, the review by the Congressional Committees will most certainly reflect tribal concerns.

Question #2: Of the issues unresolved by the regulation drafting workshops, which do you feel are most significant and what process do you think would best work to resolve them?

Answer: The most significant unresolved issues are (1) the inclusion of program standards in the regulations and (2) the referencing of OMB circulars and other laws as well as the listing of applicable FAR's for construction contracts rather than printing these verbatim in the regulations.

We believe the better way to handle unresolved issues, if in fact they remain unresolved, is to address them after distribution of the draft regulations. The schedule calls for Area reviews of the drafts with tribes for possible revisions prior to formal publication for comment in the Federal Register. There is and will be a continuing dialogue with those participating in this process.

Question #3: What has been the BIA's policy and practice with respect to the Steering Committee?

Answer: The BIA considers the Steering Committee as an Advisory committee to the Director of the IHS. In practice we have sent a representative to the Steering Committee meetings. We do not view the Steering Committee as a substitute for participation by tribal governments and other tribal organizations.

Question #4: The witnesses testified that a proposed draft of the regulations, prepared with full consultation of Indian tribes, was essentially completed April 3. Why is this draft not sufficient for promulgation as initial regulations in the Federal Register.

Answer: The draft is a record of the participation effort and is not only incomplete but is also not suitable in format, language or substance for promulgation as a draft Notice of Proposed Rule Making in the Federal Register.

Question #5: In your prepared statement, you mentioned the delay in promulgating regulations and attributed it to the need for tribal participation. Is it not true, however, that it will take a full year after the regulations are written to get OMB approval and meet all the public comment periods and that this has very little at all to do with the requirement for tribal participation?

Answer: In our statement we mentioned that one of the reasons for delay was the requirement for tribal participation. As we mentioned in the statement the normal steps and requirements for clearing important, lengthy regulations such as these are time-consuming in themselves. Some parts of this same process for getting draft regulations to final publication has little to do with actually tribal participation but are required as part of the process.

Question #6: What specific steps is your agency taking to provide tribes with the benefits of the 1988 amendments in advance of the issuance of the final regulations?

Answer: Where practical we are sending out guidance on individual items that can be implemented without regulations. Pending the promulgation of new regulations implementing the 1988 amendments to Public Law 93-638, the current Indian Self-Determination regulations in 25 CFR Parts 271-278 shall continue to remain in effect to the extent that they are not inconsistent with the provisions of the 1988 amendments.

Question #7: When does your agency intend to implement calendar year contracting?

Answer: Those tribes that wish to use the calendar year as their timeframe for contracting can do so. Moving the date from the FY to the calendar year creates a transitional quarter. If obligational or budget authority for this transitional quarter is not available, the 4th quarter would be subject to availability of funds. We understand that the House Appropriations Subcommittee for Interior and Related Agencies has recommended that budget authority be provided for this purpose in the FY 1990 appropriations for the BIA.

Question #8: If additional transitional monies are needed, how much will be needed?

Answer: The initial amount of money needed to fund the transitional quarter based on the FY 1989 Appropriation for OIP is $241,942,000 and for our FY 1989 Construction Appropriation is $5,706,000.

Questions #9: What are the preliminary estimates for the cost of commercial liability insurance?

Answer: $6,000,000 plus the cost of auto liability and workman's compensation (estimate $9M), for which we are in the process of collecting data.

Question #10: Are there any reliable cost estimates about the amount of savings that might be realized through use of a risk pool rather than a straight purchase?

Answer: No.

Question #11: What cooperation or other assistance have you provided, if any, to Double Eagle Risk Management, Inc., as the tribes proceeded to establish the corporation? Was any assistance requested?

Answer: The BIA sent representatives to Albuquerque to attend the meeting at which the insurance provisions were discussed. Individuals involved with Double Eagle Risk Management, Inc. held a meeting in Denver. The BIA supplied the cost estimates developed by Marsh & McLennan for this meeting. No assistance has been requested from the BIA and we have received no proposal from Double Eagle Risk Management, Inc.

Question #12: Do you believe IPS policies and procedures are being followed.

Answer: Attached for the Committee's information is a copy of the portion of the Bureau's manual concerning budget formulation policies for those programs on the Indian Priority System and all other Bureau programs. We believe that the guidelines are being followed.

Question #13: Are tribes, in your view, allowed to exercise their discretion on priorities in the IPS system without undue interference from the Bureau?

Answer: Budget formulation is the responsibility of the Executive Branch of Government. Input is solicited from each tribe, however, it is the responsibility of the Agency Superintendent and Area Director to ensure that essential Federal administrative and program requirements are met in the proposed budgets.

Question #14: Are tribes in multi-tribe agencies permitted to see the formulation of the total agency budget or only that portion that pertains to their particular tribe?

Answer: As the Indian Priority System is used to establish a portion of the Bureau's budget request for Federal appropriations, the Central Office treats the material as public information which is available to any interested party. We are not aware of any local decisions which would constrain access to this information. If the Committee is aware of specific instances in which tribes have been denied access to agency budget figures, we would be pleased to clarify this matter at the local level.

Question #15: Are tribes informed about increases and are they passed on to tribes or are the increases made part of the agency budget?

Answer: In the case of single-tribe agencies and multi-tribe agencies which submit a consolidated budget, the tribes' budget and the agency's budget are one and the same. In the case of multi-tribe agencies, where separate budgets are maintained, the increases are displayed in the program at the specific tribal location. Attached as an example is a copy of the information made available to the tribes under the jurisdiction of the Truxton Cannon agency on the FY 1989 appropriations.

Increases are distributed based on the budget justification and tribal-specific add-ons by Congress in the year for which appropriations are made. Some Congressional add-ons are added to the base for future years and others are not. For instance, in FY 1990, the Congressional increases for tribes where the state had retroceded law enforcement jurisdiction were included in the FY 1990 budget request, while increases for on-going programs, rather than additional responsibilities, were not maintained.

Question #16: How has the withdrawal of programs from IPS such as the Housing Improvement and Road Maintenance programs affected tribes?

Answer: These funds for these programs are now distributed based upon demonstrated need, so that all tribes and agencies receive their equitable share of the funds based on national program requirements rather than priority by the tribes. It should be noted that Housing was removed from the Indian Priority System by the Congress and that road maintenance was removed at the recommendation of the Inspector General. Other programs that have been removed from the IPS at the direction of Congress include School Operations, Forest Development (backlog reduction), and a substantial portion of Wildlife and Parks.

Questions #17: What is the purpose of conducting the Equity Funding Study?

Answer: Attached is a copy of the Bureau's budget justification for this study which was included in the FY 1988 budget request. Only $400,000 of the $700,000 request was approved by Congress.

Question #18: Why were tribes not informed about this study until 18 months after it began?

Answer: The Bureau provides copies of our budget justification to all tribal chairmen. Therefore, they were informed in February 1987 of a study for which the contract was let in August 1988.

Question #19: What is the connection between the equity funding study and the Indian Priority System?

Answer: The equity study is reviewing all Bureau programs, not just those on the Indian Priority System, to determine which would lend themselves to a different distribution methodology.

Question #20: Does the BIA consider itself bound to adhere to tribal recommendations on programs which are identified to the Congress as included in the Indian Priority System.

Answer: The responsibility for the Bureau's budget formulation rests with the Bureau management, the Department of the Interior, and, ultimately, with the President. If a tribe wishes to budget only $30,000 for the Agency Superintendent's salary when the actual salary cost is $50,000, it is the responsibility of the Agency Superintendent to ensure that the actual costs are accurately reflected in the budget request. If there is a dispute in the IPS formulation process, a tribe may appeal under 25 CFR Part 2.

Question #21: Are there any activities or functions that your agency feels should not be in the IPS system for tribes to contract? If so, what are they?

Answer: Whether funds are budgeted through the IPS or other means does not affect the contractibility or non-contractibility of the program. For instance, school operations, Johnson-O'Malley Educational Assistance, Facilities Operations and Maintenance, and General Assistance, to name but a few programs, are not on the Indian Priority System, but are available for contracting. As most of the disputes with tribes center around the funding requirements for Administrative Services and Executive Direction, it is possible that moving these funds from the agency to the area IPS base might be helpful.

Question #22: Please describe for the Committee the IPS problems at Multi-tribe agencies and tell us why tribes in those agencies have such a difficult time shifting their funds into different categories.

Answer: The situation would vary from agency to agency depending on the programs and whether the tribes were contracting or the Bureau was providing direct services, therefore generalizations are difficult. If a tribe wishes to shift funds from one program which it is contracting to another that it is contracting, there is usually no problem. On the other hand, for example, if the Bureau is providing direct services in social services and has only two staff persons to serve ten tribes and one tribe wishes to place additional funds in scholarships and reduce social services, there might then be insufficient resources in social services to pay the salaries of the two employees.

In cases where a tribe in a multi-tribe agency wishes to begin contracting, there is often a problem in operating a contracted program with that tribe's share of the resources at a multi-tribe agency. Recently one tribe submitted a request to contract for a number of programs, but their share of the workload and the agency budget would be insufficient to ensure the appropriate delivery of services. In this case, the agency has two clerks to handle 3,275 Individual Indian Money Accounts. The tribe in question has 9 accounts and wanted to contract for their "share" of the $41,000. The tribe also wanted to contract for a tribal court, yet there are an average of only 3 cases a year from that tribe which are heard in the CFR court. They also wanted to contract for social services, yet the total tribal caseload was nine whereas the average caseload per social worker in the Bureau is 140. In this instance, giving the tribe their "share" to contract would provide an insufficient amount of money to run a program, yet the workload does not justify a higher budget. In addition, the services to the other tribes in the agency would be diminished as a portion of the salary costs for the employees would be given to one tribe, even though in this instance, the same number of employees would still be required to provide services to the non-contracting tribes.

Question #23: Self-governing tribes participating in the planning phase in preparation for a full demonstration project have reported difficulty in accessing Bureau budget data at all levels. How does the Bureau intend to assist in making this information and documentation available to all tribes?

Answer: Initially, tribes participating in the planning phase of the self-governance program did have difficulty in accessing budgetary and financial data from BIA's accounting system. This was primarily due to the fact that those tribes had difficulty in defining their data needs. To overcome that problem, Bureau personnel provided on-the-spot technical assistance and advice to educate tribal personnel as to what data BIA's administrative systems maintained. Once tribes had the knowledge of what data was available, they were able to request and receive what they needed for their decision-making processes. At this time we know of no tribal request that has not been met.

Question #24: Please describe more fully what, if anything, the Bureau has done to directly or even indirectly assist the tribes as they plan for self-governance?

Answer: The Bureau has provided for the informational and budgetary/financial data needs of the participating tribes. The Bureau has met with the tribes, and the tribes have indicated to the Bureau that the demonstration grants are progressing satisfactorily. They have indicated no additional needs for guidance or assistance from the Bureau in planning for self-governance.

Seven additional tribes have received first time self-governance planning grants. As this is a recent occurrence, the Bureau has not received their informational and/or data requirements as yet. Each participating tribe has been informed that assistance is available as necessary in meeting their informational/data requirements.

Question #25: The Committee has received many letters from tribes opposing the transfer of the indirect cost negotiating function from the Office of the Inspector General. The general consensus is that it works well, has been in place for a long time, tribes are very comfortable with the process -- in effect, it is not broken, so do not fix it. It appears from your testimony that the transfer will take place, regardless of the input from the tribes at the consultation meetings. In other words, tribal input is for the record only and will have no impact on the decision. Is that a correct reading of the situation?

Answer: The Department took the Congressional request to consult with the Indian tribes very seriously and, in fact, held discussions with 332 representatives of 201 Indian tribes, tribal entities and Alaska Native organizations about the proposed transfer of responsibility for negotiating indirect cost rates from the Office of the Inspector General to the Office of the Secretary. The views expressed by these representatives are being earnestly treated as an important part of the planning and decision-making process. They are now being summarized into a "Concerns and Responses" document which is to be furnished, after appropriate Departmental reviews, to all interested parties.

It is the Department's position that having the function located in the Office of the Inspector General (OIG) does not provide a separation of the performance of the function from the auditing of the function in order to guard against fraud, waste and abuse. The current method of operation is contrary to the principle of separation of duties under OMB Circular A-123, Internal Controls, as well as the General Accounting Office's Standards for Internal Controls in the Federal Government. Also, having the OIG both perform the function and audit it is counter to the express intent of the Inspector General's Act of 1978.

At present, implementation of the decision is subject to adequate funds being appropriated in the Department's FY 1990 Budget which is now before the Congress. The major concerns being raised by representatives of the tribes in each of the consultation meetings were communicated to the House and Senate Appropriations Committees in response to their questions about the FY 1990 Budget for the Office of the Secretary. The tribal representatives repeatedly have said that one of their greatest concerns about the transfer is that the 5 FTEs in the FY 1990 Budget for the Office of Acquisition and Property Management, does not provide sufficient resources to carry out the negotiations. We are sympathetic with this concern. Our review indicates that additional budget resources, including personnel, will be required in the Office of the Secretary in order to handle the estimated 400 proposals to be negotiated and to provide the level of technical assistance the tribes are requesting. We are considering how we will respond further to the expressed concerns of the tribes.

If the Congress appropriates sufficient resources to ensure professional and timely performance of the function within the Office of the Secretary, the Department does intend to transfer the function. However, we would intend to consult further with the tribes and Alaska Native organizations, territorial governments, and affected state agencies about how such a transfer would be implemented as we proceed. The twelve consultation meetings we have conducted to date have provided valuable ideas that will be considered in implementing the transfer, if the Congress approves it.

Question #26: As you know, the Red Scaffold School is a 638 contract school that originally served grades K through 8. After it was agreed to consolidate this school with two others in a new facility, grades 9 through 12 were added under the contract. If the school closes as planned, these senior high school students will be unhoused. The tribe objects to the proposed closure.

Answer: The FY 1989 Department of the Interior and Related Agencies Appropriations Act directed the Bureau to close the Cherry Creek, Bridger and Red Scaffold Schools and consolidate the school's programs at the new school. Takini School can accommodate the 58 high school students and the Bureau has agreed to allow the Red Scaffold High School students to attend the new school.

Attachment
Question #15

14-Sep-88

FY 1989 INITIAL FUND DISTRIBUTION (Tribe/Agency--Activity 3900)

LOCATION: [illegible]—TRUXTON CANYON

SL/CP	LC OLD	LC NEW	PROGRAM TITLE	(a) FY 1989 IPS TENTATIVE	(b) ADJUST. PRIOR TO OMB	(c) -OMB Proposed Gen.Inc.	(d) OMB Passback	(e) FERS Reduction	(f) FY 1989 Fed Pay	(g) FY 1989 4.1% Pay	(h) Other Adjust.	(i) Cong. Add-Ons	(j) (-) 2 Less Workdays	(k) (-) Wldlf/Prks Transfer	(l) Initial FY 1989 FND
1365	11	01	Scholarships												0.0
1363	12	08	Adult Education												0.0
1367	13	03	Tribal.Contr.Comm.College												0.0
	—	09	*SUBTOTAL* EDU	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
2065	15	15	Adult Vocational Training												0.0
2061	16	16	Other Employ. Asst.(D.E.)												0.0
2090	17	17	Community Svcs., General												0.0
2170	18	18	Community Fire Protection												0.0
2165	20	20	Tribal Courts												0.0
2190	21	21	Other Aid to Tr	63.1				(1.8)	0.6						61.9
20XX	23	23	Social Services	65.1				(2.9)	0.9				(1.0)		62.1 +33.5
23XX	24	24	Law Enforcement	515.9				(8.7)	2.9		20.2		(4.0)		526.3
2663	26	26	S.Deter.--TGTA												0.0
2661			S.Deter.-Grants												0.0
	29	29	*SUBTOTAL* ISD	644.1	0.0	0.0	0.0	(13.4)	4.4	0.0	20.2	0.0	(5.0)	0.0	650.3
38XX	38	38	Credit & Financing												0.0
	39	39	*SUBTOTAL* ECD	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
30XX	41	41	Natural Resource	33.0											33.0
31XX	42	42	Agriculture	247.6				(5.3)	1.6				(1.0)		242.9
3168	43	43	Agriculture Exten. Svcs.												0.0
	ALL		FORESTRY [SL 33:]	80.6	0.0	0.0	0.0	(2.5)	0.8	0.0	(20.2)	19.4	(1.0)	0.0	77.1
3363	44	44	Timber Sale M	1.2				(0.1)				19.4			20.5
3381	45	45	Forest Mgt. Inv./Plans												0.0
3331	46	46	Forest Development												0.0
3361	47	47	Forest Protec	77.8				(1.5)	0.5		(20.2)		(1.0)		55.6
3390	48	48	Forest Pgm Mg	1.6				(0.9)	0.3						1.0
34XX	50	50	Water Resources												0.0
	ALL		WDLF/PRKS [SL 37:]	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
3766	51	51	Anadromous Fish. Mgt.												0.0
3767	52	52	Great Lakes Fish. Mgt.												0.0
3763	53	53	Inland Fisheries Mgmt.												0.0
3751	54	54	Wildlife Management												0.0
3768	55	55	Outdoor Recreation Mgmt.												0.0
3764	56	56	Fish Hatchery O & M												0.0
3790	57	57	F./Wdlf Resour.Unil Mgt												0.0
32XX	58	58	Minerals and Mining												0.0
	59	59	*SUBTOTAL* NAT	361.2	0.0	0.0	0.0	(7.8)	2.4	0.0	(20.2)	19.4	(2.0)	0.0	353.0
40XX	61	61	Trust Services, General												0.0
4188	62	62	Environmental Quality Svc												0.0
4190	63	63	Other Rights Protection												0.0
4861	64	64	Real Estate Appraisals												0.0
4890	65	65	Other Real Este	40.8				(0.7)	0.3						40.4
	69	69	*SUBTOTAL*TRUS	40.8	0.0	0.0	0.0	(0.7)	0.3	0.0	0.0	0.0	0.0	0.0	40.4
71XX	71	71	Executive Direc	95.9		(8.4)		(2.4)	0.8				(1.0)		84.9
78XX	72	72	Administrative	93.8		(1.3)		(4.5)	1.2				(1.0)		88.2
7871	73	73	Safety Management												0.0
	79	79	*SUBTOTAL* GEN	189.7	0.0	(9.7)	0.0	(6.9)	2.0	0.0	0.0	0.0	(2.0)	0.0	173.1
6068	81	81	New Direct Rent.of Facil.												0.0
6061	82	82	New GSA Rent. of Facil.												0.0
	89	89	*SUBTOTAL*FACI	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
	99	99	* * GRAND TOT	1,235.8	0.0	(9.7)	0.0	(28.8)	9.1	0.0	0.0	19.4	(9.0)	0.0	1,216.8

14-Sep-88

FY 1989 INITIAL FUND DISTRIBUTION (Tribe/Agency—Activity 3900)

LOCATION: 868-05—HUALAPAI

EL/CP	LC OLD	LC NEW	PROGRAM TITLE	(a) FY 1989 IPS TENTATIVE	(b) ADJUST. PRIOR TO OMB	(c) -$2M Proposed Gen.Inc.	(d) OMB Passback	(e) FERS Reduction	(f) FY 1989 Fed Pay	(g) FY 1989 638 Pay	(h) Other Adjust.	(i) Cong. Add-Ons	(j) (-) 2 Less Workdays	(k) (-) Wdlf/Prks Transfer	(l) Initial FY 1989 FTD
1360	11	01	Scholarships	38.2		(8.1)									30.1
1365	12	02	Adult Education												0.0
1367	13	03	Tribal.Contr.Comm.College												0.0
	—	09	*SUBTOTAL* EDU	38.2	0.0	(8.1)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	30.1
2065	15	15	Adult Vocational Training												0.0
2061	16	16	Other Employ. A	21.9											21.9
2090	17	17	Community Svcs., General												0.0
2170	18	18	Community Fire Protection												0.0
2160	20	20	Tribal Courts	67.7	50.0					1.0					118.7
2190	21	21	Other Aid to Tr	28.6											28.6
22XX	23	23	Social Services	18.8											18.8
23XX	24	24	Law Enforcement												0.0
2643	26	26	S.Deter.—T&TA												0.0
2641			S.Deter.-Grants												0.0
	29	29	*SUBTOTAL* IND	137.0	50.0	0.0	0.0	0.0	0.0	1.0	0.0	0.0	0.0	0.0	188.0
30XX	38	38	Credit & Financing												0.0
	39	39	*SUBTOTAL* ECO	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
50XX	41	41	Natural Resources,General												0.0
51XX	42	42	Agriculture												0.0
5160	43	43	Agriculture Ext	21.7											21.7
			ALL FORESTRY [EL 53:]	65.6	0.0	0.0	0.0	0.0	0.0	2.0	0.0	0.0	0.0	0.0	67.6
5365	44	44	Timber Sale Management							2.0					2.0
5321	45	45	Forest Mgt, I	3.7											3.7
5331	46	46	Forest Develo	61.9											61.9
5361	47	47	Forest Protection												0.0
5390	48	48	Forest Pgm Mgt(R.Funct)												0.0
54XX	50	50	Water Resources												0.0
			ALL WDLF/PRKS [EL 57:]	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
5766	51	51	Anadromous Fish. Mgt.												0.0
5767	52	52	Great Lakes Fish. Mgt.												0.0
5763	53	53	Inland Fisheries Mgmt.												0.0
5761	54	54	Wildlife Management												0.0
5762	55	55	Outdoor Recreation Mgmt.												0.0
5764	56	56	Fish Hatchery O & M												0.0
5790	57	57	F./Wdlf Resour.Util Mgt												0.0
58XX	58	58	Minerals and Mining												0.0
	59	59	*SUBTOTAL* NAT	87.3	0.0	0.0	0.0	0.0	0.0	2.0	0.0	0.0	0.0	0.0	89.3
40XX	61	61	Trust Services, General												0.0
41XX	62	62	Environmental Quality Svc												0.0
4190	63	63	Other Rights Protection												0.0
4261	64	64	Real Estate Appraisals												0.0
4290	65	65	Other Real Estate Svcs.												0.0
	69	69	*SUBTOTAL*TRUS	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
71XX	71	71	Executive Direction												0.0
72XX	72	72	Administrative Services												0.0
7271	73	73	Safety Management												0.0
	79	79	*SUBTOTAL* GEN	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
6062	81	81	New Direct Rent.of Facil.												0.0
6061	82	82	New GSA Rent. of Facil.												0.0
	89	89	*SUBTOTAL*FACI	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
	99	99	* * GRAND TOT	262.5	50.0	(8.1)	0.0	0.0	0.0	3.0	0.0	0.0	0.0	0.0	307.4

14-Sep-88

FY 1989 INITIAL FUND DISTRIBUTION (Tribe/Agency—Activity 2000)

LOCATION: B60-04—YAVAPAI-APACHE

EL/CP	LC OLD	LC NEW	PROGRAM TITLE	(a) FY 1989 TPA ENACTED	(b) ADJUST. PRIOR TO OMB	(c) -OMB Proposed Gen.Inc.	(d) OMB Passback	(e) FERS Reduction	(f) FY 1989 Fed Pay	(g) FY 1989 638 Pay	(h) Other Adjust.	(i) Cong. Add-Ons	(j) (-) 2 Less Workdays	(k) (-) Wldlf/Prks Transfer	(l) Initial FY 1989 TPA
1360	11	01	Scholarships	49.1		(1.2)									47.9
1366	10	08	Adult Education												0.0
1367	12	03	Tribal.Contr.Comm.College												0.0
	—	09	*SUBTOTAL* EDU	49.1	0.0	(1.2)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	47.9
2066	15	15	Adult Vocational	10.1											10.1
2061	16	16	Other Employ. A	9.1											9.1
2090	17	17	Community Svcs., General												0.0
2170	18	18	Community Fire	21.6											21.6
2163	20	20	Tribal Courts	10.6											10.6
2190	21	21	Other Aid to Tr	14.6											14.6
23XX	23	23	Social Services	30.9											30.9
22XX	24	24	Law Enforcement												0.0
2663	26	26	S.Devel.--TPTA												0.0
2661			S.Devel.-Grants									8.2			8.2
	29	29	*SUBTOTAL* CSD	96.9	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2	0.0	0.0	105.1
30XX	38	38	Credit & Financing												0.0
	39	39	*SUBTOTAL* ECD	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
50XX	41	41	Natural Resources,General												0.0
51XX	42	42	Agriculture	10.7											10.7
5160	43	43	Agriculture Exten. Svcs.												0.0
	ALL		FORESTRY [XL 58:]	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
5360	44	44	Timber Sale Management												0.0
5381	45	45	Forest Mgt, Inv./Plans												0.0
5331	46	46	Forest Development												0.0
5361	47	47	Forest Protection												0.0
5390	48	48	Forest Pgm Mgt(R.Funct)												0.0
54XX	50	50	Water Resources												0.0
	ALL		WDLF/PRKS [XL 57:]	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
5766	51	51	Anadromous Fish. Mgt.												0.0
5767	52	52	Great Lakes Fish. Mgt.												0.0
5763	53	53	Inland Fisheries Mgmt.												0.0
5761	54	54	Wildlife Management												0.0
5768	55	55	Outdoor Recreation Mgmt.												0.0
5764	56	56	Fish Hatchery O & M												0.0
5790	57	57	F./Wild Resour.Unit Mgt.												0.0
53XX	58	58	Minerals and Mining												0.0
	59	59	*SUBTOTAL* NRD	10.7	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	10.7
40XX	61	61	Trust Services, General												0.0
4100	62	62	Environmental Quality Svc												0.0
4190	63	63	Other Rights Protection												0.0
4061	64	64	Real Estate Appraisals												0.0
4080	65	65	Other Real Estate Svcs.												0.0
	69	69	*SUBTOTAL*TRUS	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
71XX	71	71	Executive Direction												0.0
72XX	72	72	Administrative Services												0.0
7871	73	73	Safety Management												0.0
	79	79	*SUBTOTAL* GAD	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
6900	81	81	New Direct Rent.of Facil.												0.0
6901	82	82	New GSA Rent. of Facil.												0.0
	89	89	*SUBTOTAL*FACI	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
	99	99	* * GRAND TOT	156.7	0.0	(1.2)	0.0	0.0	0.0	0.0	0.0	8.2	0.0	0.0	163.7

14-Sep-88

FY 1989 INITIAL FUND DISTRIBUTION (Tribe/Agency—Activity 2000)

LOCATION: [illegible]

EL/CP	LC OLD	LC NEW	PROGRAM TITLE	(a) FY 1989 IPS TENTATIVE	(b) ADJUST. PRIOR TO OMB	(c) -OMB Proposed Gen.Inc.	(d) OMB Passback	(e) PRES Reduction	(f) FY 1989 Fed Pay	(g) FY 1989 436 Pay	(h) Other Adjust.	(i) Cong. Add-Ons	(j) (-) 2 Less Workdays	(k) (-) Wldlf/Prks Transfer	(l) Initial FY 1989 FTE
1365	11	01	Scholarships												0.0
1366	12	02	Adult Education												0.0
1367	13	03	Tribal.Contr.Comm.College												0.0
	—	09	"SUBTOTAL" EDU	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
2065	15	15	Adult Vocational	1.4											1.4
2061	16	16	Other Employ. A	8.8						1.0					9.8
2090	17	17	Community Svcs., General												0.0
2170	18	18	Community Fire Protection												0.0
2105	20	20	Tribal Courts	10.0											10.0
2190	21	21	Other Aid to Tr	11.1											11.1
20XX	23	23	Social Services												0.0
22XX	24	24	Law Enforcement												0.0
2043	26	25	S.Deter.—TPA												0.0
2041			S.Deter.-Grants												0.0
	29	29	"SUBTOTAL" TSD	31.3	0.0	0.0	0.0	0.0	0.0	1.0	0.0	0.0	0.0	0.0	32.3
26XX	38	38	Credit & Financing												0.0
	39	39	"SUBTOTAL" ECD	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
30XX	41	41	Natural Resource	17.8		(0.4)									17.4
31XX	42	42	Agriculture												0.0
3160	43	43	Agriculture Exten. Svcs.												0.0
	ALL	FORESTRY	[EL 32:]	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
3242	44	44	Timber Sale Management												0.0
3281	45	45	Forest Mgt, Inv./Plans												0.0
3231	46	46	Forest Development												0.0
3261	47	47	Forest Protection												0.0
3290	48	48	Forest Pgm Mgt(S.Forst)												0.0
34XX	50	50	Water Resources												0.0
	ALL	WDLF/PRKS	[EL 37:]	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
3766	51	51	Anadromous Fish. Mgt.												0.0
3767	52	52	Great Lakes Fish. Mgt.												0.0
3763	53	53	Inland Fisheries Mgmt.												0.0
3761	54	54	Wildlife Management												0.0
3762	55	55	Outdoor Recreation Mgmt.												0.0
3764	56	56	Fish Hatchery O & M												0.0
3790	57	57	F./Wild Resour.Prgl Mgt												0.0
38XX	58	58	Minerals and Mining												0.0
	59	59	"SUBTOTAL" NRS	17.8	0.0	(0.4)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	17.4
40XX	61	61	Trust Services, General												0.0
41XX	62	62	Environmental Quality Svc												0.0
4190	63	63	Other Rights Protection												0.0
4061	64	64	Real Estate Appraisals												0.0
4090	65	65	Other Real Estate Svcs.												0.0
	69	69	"SUBTOTAL/TRUS	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
71XX	71	71	Executive Direction												0.0
72XX	72	72	Administrative Services												0.0
7271	73	73	Safety Management												0.0
	79	79	"SUBTOTAL" GEN	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
6066	81	81	New Direct Cost.of Facil.												0.0
6064	82	82	New GSA Rent. of Facil.												0.0
	89	89	"SUBTOTAL/FACI	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
	99	99	* * GRAND TOT	49.1	0.0	(0.4)	0.0	0.0	0.0	1.0	0.0	0.0	0.0	0.0	49.7

14-Aug-89

FY 1989 INITIAL FUND DISTRIBUTION (Tribe/Agency—Activity 3900)

LOCATION: 860-04—TONTO-APACHE

EL/CP	LC OLD	LC NEW	PROGRAM TITLE	(a) FY 1989 IPS TENTATIVE	(b) ADJUST. PRIOR TO OMB	(c) -$2M Proposed Gen.Inc.	(d) OMB Passback	(e) FERS Reduction	(f) FY 1989 Fed Pay	(g) FY 1989 638 Pay	(h) Other Adjust.	(i) Cong. Add-Ons	(j) (-) 2 Less Workdays	(k) (-) Wldlf/Prks Transfer	(l) Initial FY 1989 FDD
1365	11	01	Scholarships	6.0											6.0
1368	12	02	Adult Education												0.0
1367	13	03	Tribal.Contr.Comm.College												0.0
	—	09	*SUBTOTAL* EDU	6.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	6.0
2068	15	15	Adult Vocational	3.4											3.4
2061	16	16	Other Employ. Asst.(D.E.)												0.0
2090	17	17	Community Svcs., General												0.0
2170	18	18	Community Fire	3.4											3.4
2165	20	20	Tribal Courts	8.5											8.5
2190	21	21	Other Aid to Tr	17.4											17.4
22XX	23	23	Social Services												0.0
23XX	24	24	Law Enforcement	21.7		(0.5)									21.2
2663	26	26	S.Deter.—TGTA												0.0
2661			S.Deter.-Grants									5.0			5.0
	29	29	*SUBTOTAL* IND	54.4	0.0	(0.5)	0.0	0.0	0.0	0.0	0.0	5.0	0.0	0.0	58.9
28XX	32	32	Credit & Financing												0.0
	39	39	*SUBTOTAL* ECO	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
50XX	41	41	Natural Resources,General												0.0
51XX	42	42	Agriculture												0.0
5160	43	43	Agriculture Exten. Svcs.												0.0
			ALL FORESTRY [EL 53:]	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
5362	44	44	Timber Sale Management												0.0
5321	45	45	Forest Mgt. Inv./Plans												0.0
5331	46	46	Forest Development												0.0
5361	47	47	Forest Protection												0.0
5390	48	48	Forest Pgm Mgt(B.Funct)												0.0
54XX	50	50	Water Resources												0.0
			ALL WDLF/PRKS [EL 57:]	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
5766	51	51	Anadromous Fish. Mgt.												0.0
5767	52	52	Great Lakes Fish. Mgt.												0.0
5763	53	53	Inland Fisheries Mgmt.												0.0
5761	54	54	Wildlife Management												0.0
5762	55	55	Outdoor Recreation Mgmt.												0.0
5764	56	56	Fish Hatchery O & M												0.0
5790	57	57	F./Wdlf Resour.Util Mgt												0.0
32XX	58	58	Minerals and Mining												0.0
	59	59	*SUBTOTAL* NAT	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
40XX	61	61	Trust Services, General												0.0
41XX	62	62	Environmental Quality Svc												0.0
4190	63	63	Other Rights Protection												0.0
4361	64	64	Real Estate Appraisals												0.0
4390	65	65	Other Real Estate Svcs.												0.0
	69	69	*SUBTOTAL*TRUS	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
71XX	71	71	Executive Direction												0.0
78XX	72	72	Administrative Services												0.0
7871	73	73	Safety Management												0.0
	79	79	*SUBTOTAL* GEN	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
6062	81	81	New Direct Rent.of Facil.												0.0
6061	82	82	New GSA Rent. of Facil.												0.0
	89	89	*SUBTOTAL*FACI	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
	99	99	* * GRAND TOT	60.4	0.0	(0.5)	0.0	0.0	0.0	0.0	0.0	5.0	0.0	0.0	64.9

14-Sep-88

FY 1989 INITIAL FUND DISTRIBUTION (Tribe/Agency—Activity 2900)

LOCATION: B68-11 HAVASUPAI

EL/CP	LC OLD	LC NEW	PROGRAM TITLE	(a) FY 1989 IPS EXECUTIVE	(b) ADJUST. PRIOR TO OMB	(c) -GSA Proposed Gen.Inc.	(d) OMB Passback	(e) FERS Reduction	(f) FY 1989 Fed Pay	(g) FY 1989 638 Pay	(h) Other Adjust.	(i) Cong. Add-Ons	(j) (-) 2 Less Workdays	(k) (-) Wldlf/Prks Transfer	(l) Initial FY 1989 FTD
1363	11	01	Scholarships	7.3											7.3
1366	12	02	Adult Education	1.4											1.4
1367	13	03	Tribal.Contr.Comm.College												0.0
	—	09	*SUBTOTAL* EDU	8.7	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.7
2865	15	15	Adult Vocational Training												0.0
2861	16	16	Other Employ. Asst.(D.E.)												0.0
2090	17	17	Community Svcs., General												0.0
2170	18	18	Community Fire	6.0											6.0
2165	20	20	Tribal Courts	24.4											24.4
2190	21	21	Other Aid to Tribal Gov't												0.0
28XX	23	23	Social Services	13.8		(0.6)									13.2
22XX	24	24	Law Enforcement												0.0
2663	26	26	S.Deter.—TBIA												0.0
2661			S.Deter.-Grants												0.0
	29	29	*SUBTOTAL* TSD	44.2	0.0	(0.6)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	43.6
38XX	38	38	Credit & Financing												0.0
	39	39	*SUBTOTAL* ECO	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
30XX	41	41	Natural Resources,General												0.0
31XX	42	42	Agriculture	30.8											30.8
3168	43	43	Agriculture Exten. Svcs.												0.0
	ALL		FORESTRY (EL 32:)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
3262	44	44	Timber Sale Management												0.0
3231	45	45	Forest Mgt. Inv./Plans												0.0
3221	46	46	Forest Development												0.0
3261	47	47	Forest Protection												0.0
3290	48	48	Forest Pgm Mgt(E.Fence)												0.0
34XX	50	50	Water Resources												0.0
	ALL		WDLF/PRKS (EL 37:)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
3766	51	51	Anadromous Fish. Mgt.												0.0
3767	52	52	Great Lakes Fish. Mgt.												0.0
3763	53	53	Inland Fisheries Mgmt.												0.0
3761	54	54	Wildlife Management												0.0
3762	55	55	Outdoor Recreation Mgmt.												0.0
3764	56	56	Fish Hatchery O & M												0.0
3790	57	57	F./Wdlf Resour.Util Mgt												0.0
32XX	58	58	Minerals and Mining												0.0
	59	59	*SUBTOTAL* NAT	30.8	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	30.8
40XX	61	61	Trust Services, General												0.0
4122	62	62	Environmental Quality Svc												0.0
4190	63	63	Other Rights Protection												0.0
4061	64	64	Real Estate Appraisals												0.0
4290	66	66	Other Real Estate Svcs.												0.0
	69	69	*SUBTOTAL*TRUS	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
71XX	71	71	Executive Direction												0.0
72XX	72	72	Administrative Services												0.0
7871	73	73	Safety Management												0.0
	79	79	*SUBTOTAL* GEN	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
6048	81	81	New Direct Rent.of Facil.												0.0
6061	82	82	New GSA Rent. of Facil.												0.0
	89	89	*SUBTOTAL*FACI	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
	99	99	* * GRAND TOT	83.7	0.0	(0.6)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	83.1

Attachment
Question # 17

resources activities in the Central Office, and for limited field office land and trust matters. The responsibilities of staff covered by this program range among the following activities: (1) Environmental Services; (2) Rights Protection; (3) Real Estate Services, Appraisals, Land Use Planning and Land Records Improvement; (4) Financial Trust Services; (5) Agriculture; (6) Range; (7) Soil and Moisture Conservation; (8) Forestry; (9) Fire Suppression; (10) Energy and Minerals; (11) Water Resources; (12) Wildlife and Parks; (13) Irrigation Construction, Operation and Maintenance; (13) Fish and Game Management; (14) Water Policy Implementation; (15) Cultural Resources and Archeological Clearances; (16) Hazardous Waste; (17) Road Construction and Maintenance; (18) Credit & Financing; (19) Economic Development, and other trust-related activities.

In the Central Office, the Office of the Deputy to the Assistant Secretary-Indian Affairs, (Trust & Economic Development) provides program direction and support for all of these programs. Trust Services, General provides funding for the staff of Office of the Deputy to the Assistant Secretary-Indian Affairs (Trust & Economic Development), including most of the Program Coordination Staff. In the area offices, funds are used for Rights Protection staff, for studies, contracts, geographic information system agreements and other services that affect trust responsibilities programs at field offices.

Increase/Decrease from FY 1988 Base:

(Dollars amounts in thousands)

Program Element Trust Services, General		FY 1988 Base	FY 1988 Estimate	Difference
Area Office Operations:	$ (FTE)	644 (12)	615 (12)	- 29 (--)
Field Operations:				
Resource Allocation/ Effectiveness Study	$ (FTE)	-- (--)	700 (--)	+ 700 (--)

Area Office Operations (-$29,000; FTE 0): This decrease is a direct result of the application of the area office Indian Priority System (IPS). The IPS allows the Area Director to establish program funding levels and to rank, in order of priority, program packages.

Resource Allocation/Effectiveness Study: (+$700,000; FTE 0): The FY 1988 request includes $700,000 to perform special studies related to the identification of criteria and methods for determining equity in the allocation of Bureau of Indian Affairs funding among the tribes it serves. Funds will also finance efforts to consult with tribal governments, both in the identifying the criteria to be to be used as well as in the developing the final method to be used for Bureau resource allocations in future fiscal years.

Establishing a funding "base" for each tribe served has posed a challange to the Bureau, particularly in view of all available resources and the size, management capabilities, and unique situations of Indian tribes. Numerous recommendations received by the Bureau from tribes and other sources regarding alternative funding mechanisms.

Generally, the "base" funding provided by the Bureau to each location has evolved through time by tribal priorities, arbitrary fund allocations, either by

Executive Branch decision or by the process of Congressional add-ons. Few of these resource allocation decisions have been made without any concern for the overall impacts. Instead, allocations have been made without concern for only a specific programmatic need. Due to this, current operating program funding "bases" vastly differ between locations, even though similarity of "needs" may exist. Because of these funding differences, many tribes believe that they are treated unfairly in the allocation of Bureau resources.

The ability of the Bureau to deal with tribal concerns over funding distribution has been hampered by many factors. Several attempts have been made by the Bureau, to determine "equity" within individual programs such as law enforcement, but there has been no overall plan to address the allocation of Bureau funds.

Overall Federal funding levels should be distributed among the tribes based upon a rational and equitable method. Once that is accomplished, specific program amounts should be determined through consultation with those tribal governments and self-determination by tribes would be enhanced.

The Bureau of Indian Affairs can only directly deal with those programs which it is responsible for providing to tribes. The funding levels provided by other sources (Federal, state, tribal, etc.) do, however, impact upon needs which are being met by Bureau programs and will be reviewed in this effort.

The analysis envisioned for this initiative must also review each Bureau program in sufficient detail to determine which needs are being met by the program. Measurable quantitative data (outputs) must be identified for each program which can be used in any forumula which is developed. Coincidentally, the Office of Management and Budget is embarking on a government-wide effort to review all programs by FY 1992 in terms of measuring "productivity" and establishing unit costs. Therefore, the proposed studies can serve a dual purpose.

Tribal situations will have to be analyzed to determine which criteria will be used to identify the needs of each tribe. These criteria must be expressed in quantifiable data terms in order to be useful in any methodology for fund distribution. Tribal government cooperation in data gathering will be essential to the successful completion of this task. In addition, the Bureau must forge a general consensus among all of the tribes that the selected methodology is reasonable and fair. Therefore, tribal consultation at all appropriate points in the study process is an essential ingredient to the initiative.

While the Bureau anticipates that some elements of the study process could be initiated during FY 1987, the major effort has been scheduled for FY 1988 as a budget initiative. This approach has been taken to provide the opportunity for tribal and Congressional review of the proposals prior to their initiation. Assuming approval of the study purpose and procedures during the FY 1988 appropriations process, actual implementation of any methodology could not take place earlier than FY 1990.

Assuming that an acceptable methodology is developed, the Bureau would apply it to its operating program funding resources to determine a reasonable "base" for each tribe. Once that base was established, it would be the Bureau's intention to use direct input from the tribal governments to determine the specific programmatic priorities and details of future budget requests.

The funds requested for the special studies would be used to finance the costs of establishing and operating a task force composed of Bureau staff, tribal representatives, and outside public and/or private sector representatives. Only the additional expenses of travel and support costs would be provided for the participation of the Bureau staff, whose salaries would be borne by the program/locations where they were normally assigned. Tribal, other public sector and private sector participants would be asked to participate on a voluntary basis but would be provided expenses. A portion of the funds would be needed to provide computer based support to handle the volume of data which would be required to be collected to develop a methodology.

Some of the funding requested would be needed to carry-out periodic consultations with tribal governments on all aspects of the studies as they progress. It is currently anticipated that the studies would continue at least into FY 1989. During FY 1987, the estimated cost are as follows:

Task Force.............,	$ 150,000
Consultant Services.....	400,000
Bureau Participation ...	50,000
Tribal Consolidation....	100,000
TOTAL	$ 700,000

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service
Rockville MD 20857

JUL 13 1989

The Honorable Daniel K. Inouye
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to the questions submitted to the Committee subsequent to the June 9, 1989, hearing on the implementation of P.L. 100-472, the amendments to the Indian Self-Determination and Education Assistance Act.

If I can be of further assistance, please do not hestitate to let me know.

A similar letter is being sent to Senator McCain.

Sincerely yours,

Everett R. Rhoades, M.D.
Assistant Surgeon General
Director

Enclosure

The Department of Health and Human Services Response to Questions Raised by the Senate Select Committee on Indian Affairs Subsequent to the June 9, 1989, Hearing on the Implementation of P.L. 100-472, the Amendments to the Indian Self-Determination and Education Assistance Act

The following questions were submitted by the Senate Select Committee on Indian Affairs to the Director, Indian Health Service, Public Health Service.

1. **Question:** With respect to the decision of the IHS and BIA to rewrite the regulations in-house before any further participation by tribes, do you believe the thirteen months required by the schedule after the joint meetings with the tribes at the area level in August will provide any meaningful opportunity for tribal input? If so, how?

   Answer: Yes. The schedule provides an opportunity for the Steering Committee to review the Notice of Proposed Rulemaking (NPRM) before it is submitted for clearance. It also provides for a 60-day comment period on the NPRM and an opportunity for the Steering Committee to review public comments on the NPRM and any proposed changes resulting from the public comments prior to submitting the final regulations for final clearance.

2. **Question:** Of the issues unresolved by the regulation drafting workshops, which do you feel are most significant and what process do you think would best work to resolve them?

   Answer: As I noted in my testimony before the Committee on June 9, there are several significant issues where agreement was not reached with the tribes. These include contractability, divisibility, funding levels, program standards, data collection and reporting, and quality assurance. The process to deal with these issues is set forth in the Act, and includes a multi-faceted participative approach to develop the NPRM, and publication of the NPRM under the Administrative Procedures Act which includes a 60-day comment period after which consideration will be given to comments prior to publication of a final rule.

3. Question: What has been the IHS's policy and practice with respect to the Steering Committee?

   Answer: I established the National P.L. 93-638 Steering Committee to oversee the entire 638 Amendment implementation process and to give advice and make recommendations to me about implementation of the Amendments, including regulations development, work group products, and results of tribal consultation and participation. The Steering Committee is a means of communication for IHS to work jointly with tribal representatives to meet the statutory requirement and the spirit of tribal participation.

   The Steering Committee consists of 30 members of which 18 (60 percent) are tribal (non-Federal) members. Included are tribal representatives from each IHS Area and from the National Indian Health Board, and tribal co-chairpersons from each of the four (4) IHS/Tribal Work Groups.

   The Steering Committee first met in Rockville, Maryland, February 1-2, 1989. Members of the Steering Committee have periodically advised me through conference calls on the process. Most of the members of the Steering Committee were on Tribal/IHS Amendments Work Groups and participated in the two joint IHS/BIA/Tribal Regulations Drafting Workshops (RDWs) held February 28 - March 3 in Nashville, and March 21 - 23 in Albuquerque.

   As a result of the RDWs and after consulting with tribal members of the P.L. 93-638 Steering Committee, the schedule was further revised to the August 1990 deadline to provide additional time for IHS and BIA to prepare specifications for a draft NPRM; tribal participation in reviewing the specifications; minimum time requirements for clearance of the NPRM by the Departments and the Office of Management and Budget; and, review by Congressional Committees. Other meetings are scheduled to review draft specifications for a Notice of Proposed Rulemaking (NPRM); review results of the joint IHS, BIA, tribal meetings in the Areas; make recommendations to me on the joint NPRM; review results of the public comment period; and make recommendations to me about the content of the final regulations.

4. Question: The witnesses testified that a proposed draft of the regulations, prepared with full consultation of Indian tribes, was essentially completed April 3. Why is this draft not sufficient for promulgation as initial regulations in the Federal Register?

   Answer: The draft will certainly provide the principal basis for the initial regulation. However, while the draft represents the views of the majority of tribal participants, it was developed with only limited participation of federal staff. In some cases, the IHS/federal concerns were expressed in the document and in others, the federal concerns were made orally for the record. While federal concerns were expressed in many cases there was no negotiated agreement. Rather, a vote was taken which determined the language to be inserted in the document. Therefore, the Working Document does not necessarily represent the view of the Department, as any NPRM must.

5. Question: **What specific steps is your agency taking to provide tribes with the benefits of the 1988 amendments in advance of the issuance of the final regulations?**

Answer: Because of the delay in promulgating regulations the Indian Health Service believes that it is essential to continue actions initiated prior to the Amendments which will simplify administration of the Indian Self-Determination program. We have issued instructions to our Area Offices of personnel and cost reporting provisions and instructions will be issued in the next few weeks on additional provisions contained in the Amendments which can be instituted before regulations are issued. In addition, by August 31, we will identify from the draft NPRM other provisions that simplify the contracting process and decrease reporting and federal approvals. These provisions will be incorporated into individual contracts with the approval of P.L. 93-638 contractors.

6. Question: When does your agency intend to implement calendar year contracting?

Answer:The Indian Health Service will implement this provision, with the approval of the contractor, on an individual contract basis or by an Indian tribe's request. The House Appropriations Committee mark-up provides $23 million for transition. Should this be in the Appropriations Act, calendar year funding will be available on January 1, 1990. Because there will be a delay in the issuance of the final regulations, any such contracts will be governed by the current regulations to the extent they are not in conflict with the amendments.

7. Question: If additional transitional monies are needed, how much will be needed?

Answer: The Indian Health Service (IHS) believes that it is the decision of the Tribal contractor to elect to be funded on a calendar year basis instead of a fiscal year basis as allowed by P.L. 93-638 Amendments. If all tribal contractors that are funded on a fiscal year basis elect to be funded on a calendar year basis, the IHS would require an additional $23 million. This is based upon known obligations for current contractors within the first quarters of the fiscal year.

8. Question: Do you intend to allow tribal contractors to retain rental income from quarters provided to them under the Act for purposes of maintenance and repair as the BIA does or will the IHS insist that payments be made to IHS?

   Answer: The IHS realized a need to develop a mechanism to assure the quarters collections are used as intended by the Congress, i.e. for the operation and maintenance of quarters. The IHS Quarters Return (QR) Fund, is the aggregate of quarters rental collections. Though most rents are collected centrally by payroll deduction, nearly all (98.7%) of the collections are returned to the IHS Area where the occupant was charged. The annual charge for regional surveys and quarters appraisals performed by the Department of Interior, Bureau of Reclamation, is the only Headquarters Collection offset. To recoup money from the Area QR Fund, the service units routinely develop an annual workplan for quarters operations cost, maintenance, and major repair and improvement projects.

   More and more Indian tribes are contracting to manage income generating programs incidental to the provision of quality health care. One approach under consideration is for the Indian Self-Determination Act regulations to offer contractors with quarters responsibility the option of participating in the IHS Quarters Fund or of keeping the collections in a separate bank account, to be used for the operation and maintenance of government quarters at the contract location.

9. **Question: If a proposal to contract requests more funds than are available under section 106, do you believe your agency is required to decline the proposal and then to provide an appeal and hearing in accordance with section 102?**

Answer: IHS budget allocation decisions are not reviewable under the declination criteria. While P.L. 93-638 provides authority for the IHS to contract with Indian tribal organizations, P.L. 93-638, as amended does not provide budget or apportionment authority. That authority is instead provided by the Snyder Act, 25 U.S.C. 13, and the Indian Health Care Improvement Act, 25 U.S.C. 1601 et. seq. Decisions to allocate resource appropriated under those Acts are not governed by the declination criteria. This is recognized under section 106 of the Act which provides that tribes should get not less than the Secretary would otherwise provide for his direct operation of the program.

However, the regulations should provide a fair and accessible appeals process to enable tribes to see and challenge the IHS's identification of available resources. While regulations are still under development, the Regulations Drafting Workshop II Working Document reflects a process under which if a proposal to contract requests more funds than are available under section 106 the proposal would be declined for the reason that the proposed contract cannot be properly completed or maintained within the amount of funds determined to be available, provided that review of such funding determination under the Administrative Procedures Act should be based on section 106 of the Act and the implementing regulations and not on the declination criteria in section 102 of the Act. An appeal and a hearing would be provided on this basis.

Testimony by Lionel R. John, Executive Director
United South and Eastern Tribes, Inc.
before the Senate Select Committee on Indian Affairs
Oversight Hearing on P.L. 100-472

Good morning Mr. Chairman, Members of the Committee and staff. My name is Lionel John. I am the Executive Director of the United South and Eastern Tribes, Inc. (USET). USET is an inter-tribal organization made up of 18 Federally recognized tribes located along the South coast from Texas to Florida and along the East Coast to the State of Maine.

First, I would like to commend you Mr. Chairman and your committee for the excellent work you did during the 100th Session of Congress in getting enactment of P.L. 100-472, the Amendments to P.L. 93-638, the Indian Self-Determination and Education Assistance Act. We are now many months into the development of regulations to cover the amendments and I agree it is good to hold this oversight hearing to monitor the progress at this time.

The Bureau of Indian Affairs and the Indian Health Service started developing regulations shortly after the enactment of the Amendments, but on seperate tracks. Then at the insistance of the tribes, IHS responded by moving to enlist the BIA to join with IHS and the tribes to develop a single set of regulations to cover both agencies. This movement is an amazing accomplishment because the Amendment is silent on this subject, although it was in the report language and having a single set of regulations is exactly what the tribes have desired for so long.

IHS and BIA, with the tribal representatives, proceeded through a series of workgroup meetings and two Regulation Development Workshops (RDW's). I personally enjoyed this unique and wonderful experience having been selected to chair the RDW meetings. I have also served as a Co-Chair for Dr. Everett Rhoades, Director, IHS Steering Committee for the P.L. 100-472 Regulations development process.

I want to point out that while IHS has demostrated a great deal of enthusiasm in working with the tribes, the BIA has seemed to resist this effort. The BIA continually insist on doing things by their own methods and only minimally involve the tribes. An example of this occurred during the RDW I at Nashville when it became apparent the work load was great enough to require another meeting. Dr. Everett Rhoades immediately agreed and committed funds to a second RDW meeting. BIA on the other hand argued for two days and finally consented to another meeting, but did not contribute any funding other than their own travel expenses.

I further want to comment that getting good, quick decisions from the Director of IHS is very satisfying to the tribes and shows that the elevation of the Director's position has brought some good results. Dr. Everett Rhoades needs to be commended for his efforts. The BIA on the other hand needs to be jolted out of doing things by the old way. One point on this is the BIA insisting it needs separate regulations for each of its programs. This could possibly require over 30 sets of regulations. This idea is ridiculous and shows the BIA lacks the initiative to gain improvements and efficiency that are called for in P.L. 100-472.

One of the major issues addressed in P.L. 100-472 is the handling of Indirect cost recoveries by the tribes. The tribes believe the act now provides the mechanism to pay the full amount due the tribes without extracting shortfalls from service dollars. This problem had been identified as a reason why many tribes had not contracted under P.L. 93-638. At this time, neither BIA or IHS has put forth any proposal to Congress as required under P.L. 100-472 for the additional funding needed, but they have offered different alternatives. The BIA has requested a one year delay, while the IHS seeks to use third party recoveries to pay the shortfalls. The tribes do not agree with this approach because the funds derived from health care should be used for supplimenting health care funding shortages. P.L. 100-472 has mandated Indirect cost be treated as a separate funding matter apart from other budget items.

Tribes are very pleased with the provision to provide for Liability Insurance Coverage, however we feel the issue should go further. Tribes would like to create an opportunity for tribal economic development by establishing an Insurance company similiar to "Amerind," a company organized for Indian Housing Authorities. It is our suggestion that a "demonstration project" be initiated to further such a development. It is envisioned that once fully operational, this approach would result in cost savings for the tribes and the federal government.

The Act calls for a study by the BIA with the tribes participating on the Indian Priority System and BIA's budgeting and funding allocation processes. The study has been taken, but I worry about the quality of the report because the study was conducted in a haphazard manner. BIA did not provide any funding for the study, thus hampered the work. Area offices had to obtain responses any way they could and many tribes did not participate. The effort that was made did result in a finding that very few tribes have knowledge of the BIA's budget system. It is nearly impossible for the tribes to fully respond to something that is not understood and the BIA does not appear to make an effort to assist the tribes. It may be necessary to repeat the study with proper support from the BIA to the tribes.

Another item has surfaced which may require clarification. The wording contained in Title II, section 102 (D) applies to "other" agencies. It has not been determined how this would apply to the agencies such as HUD, DOL, or EPA and if funds can be transferred to a 638 agreement. This is one of several outstanding issues left unresolved after RDW II. IHS and BIA have returned to their respective offices and will apparently develop regulations for the unresolved issues without further tribal participation. We may not see the language for these issues possibly until a Notice of Proposed Rulemaking is issued. The tribes are very concerned about this because they worry if any changes will be made once the proposed rules are issued.

There are several provisions under P.L. 100-472 which can be implemented without the delay of regulations development. BIA and IHS have made reference to so called "NOW" list, but neither agencies has issued anything on their NOW list as of this date.

Work from the RDW's concentrated on "contracts." There has not been much consideration on grants, cooperative agreements, or other "simplified contracts."

Another item of concern to Indian people is that there appears to be some inconsistencies between the intention of P.L. 100-472 and P.L. 100-713 (Indian Health Care Improvement Act of 1988). These may be a matter of interpretation, but the ambiguity exists and therefore presents the need to clarify the issue. The inconsistencies center around the following:

A. P.L. 100-472 calls for a reduction in the overall number of reports required to be submitted by tribal contractors under Self-Determination contracts. P.L. 100-713 includes language which will probably result in the requirement to submit federally-determined report forms for such programs as the Community Health Representative Program.

B. Section 711 of P.L. 100-713 allows the Secretary to reduce the base resources of any recurring program, project, or activity of a service unit up to five (5) percent from the previous fiscal year amount without providing justification to Congress. This appears to be in conflict with P.L. 100-472 which states (the intention) that the Secretary should provide full funding, with reductions only in proportion to reductions in appropriation amounts. It appears that a "back door" for reducing the amount of tribal contracts could be opening. We would request that Congress please review this.

C. The relationship between Title V of P.L. 100-713 (Urban Indian Health Services) and Title II of P.L. 100-472 leaves some Indian people unclear as to whether tribes and tribal organizations may utilize the new Self-Determination non-procurement instruments to provide the services listed as eligible for contracts and grants in Title V. The wording of Title V seems to imply that grants and contracts for urban center operations and unmet needs assessments will continue to be "Buy Indian" (437) and not entitled to the benefits of mature contract status. This issue should be clarified.

Finally, I want to bring to the Committees attention other important issues that need action. First, is the "eligibility" issue with IHS, which requires a report to Congress. It does not appear anything will be done before the date the final rules become effective which is October 1, 1989. I request the Committee move to keep the moratorium in effect indefinitely or until an acceptable solution is found.

Another concern is the requirement from OMB for IHS to split its budget between federal and tribal funds. It is our understanding that IHS was made to comply with this budget process, however tribes were not made aware of this until after it was done. The tribes do not have a clear understanding about the purpose for this split budget, therefore object to these changes and insist on an explanation.

The tribes were advised the Interior Department is changing the system and responsibility for negotiating Indirect cost rates from the Inspector Generals office to another office known as PAM. We object to such a move because the present system is now working well between the tribes and Inspector Generals office and does not need "fixing." Tribes are suspicious that this is just another BIA maneuver to short change the tribes from full Indirect cost recovery because if BIA can control the negotiations they will force tribes into unwarranted reductions.

I will conclude my remarks and thank you Mr. Chairman for this opportunity to address you and the Committee with my concerns on the implementation of P.L 100-472.

UNITED SOUTH AND EASTERN TRIBES, INC.

RESOLUTION NO. B-89-226

A RESOLUTION TO OPPOSE MOVING INDIRECT COSTS RESPONSIBILITIES

WHEREAS, the Department of the Interior has proposed moving responsibility for the negotiation and oversight of tribal indirect cost rates from the Interior Office of Inspector General to the Interior Office of Policy, Budget, and Administration; and

WHEREAS, the current system works well, all tribes are covered by the Single Audit Act, for which the OIG is administratively responsible, the OIG is familiar with tribal organizations, and the OIG staff is now performing efficiently and effectively on the negotiation of indirect costs, and

WHEREAS, there is an inherent confict in the Office of Policy, Budget, and Administration, which develops budgets for the Department, negotiating indirect costs rates, in that the temptation will be present to lower those rates in order to lower the budgets, and

WHEREAS, Interior has only budgeted five positions to handle this task, which could result in a ratio of one staff member for 80 tribes and tribal organizations, compared with an OIG ratio of one to 20, now

THEREFORE BE IT RESOLVED, that the Board of Directors of United South and Eastern Tribes does hereby vehemently oppose the proposed transfer of indirect cost responsibilities to the Interior Office of Policy, Budget, and Administration, and does hereby suggest that if the responsibility cannot be maintained by the OIG, that it be returned to the original cognizant agencies, such as the DHHS Office of Cost Allocation, and

BE IT FURTHER RESOLVED, that the Board of Directors does hereby urge member Congressional delegations to contact appropriate officials of the executive branch.

CERTIFICATION

This resolution was duly passed at a United South and Eastern Tribes Board of Directors meeting held at Bar Harbor, Maine, June 4 through 9, 1989, at which a quorum was present.

Joel Frank, President
United South and Eastern Tribes

Harold Tarbell, Secretary
United South and Eastern Tribes